Supreme Court, U.S.
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No. 02-563

In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied settled principles of law in affirming, under the particular facts and circumstances of this case, the findings of both the jury and the District Court that petitioners, with intention to intimidate, unlawfully threatened to kill respondents.

RULE 29.6 STATEMENT

Two respondents, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center (now known as All Women's Health Center), are non-profit corporations. Neither has a parent corporation and no publicly-held company owns 10% of either's stock.

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

ACLA's petition for a writ of certiorari boils down to a dispute about the particular facts of this case — facts adduced through twenty-seven witnesses at a three-week trial and reviewed independently by the *en banc* Court of Appeals. As ACLA's own petition makes clear, there is no conflict of authority as to the law of threats. Petitioners seek review simply because they disagree with the view of the facts taken by the jury, the District Court Judge and the Ninth Circuit *en banc* majority, all of whom found that petitioners, with intention to intimidate, threatened to inflict bodily injury on respondents. Petitioners' disagreement with this factual result is not a basis for Supreme Court review.

In the *en banc* decision authored by Judge Rymer, the Ninth Circuit relied on the well-settled law of threats, as to which there is no conflict of authority, and gave additional deference to petitioners' First Amendment claim by conducting a searching, independent review of the trial record to find — as the jury and District Court had found — that ACLA's statements were proscribable true threats of bodily injury. Indeed, even the dissenters agreed that the majority articulated the correct legal standard for true threats, properly considered context and correctly articulated the applicable standard of review. The dissenters merely disagreed with how those properly stated legal standards were to be applied to the particular facts of this case. Factbound disputes such as this do not merit this Court's review.

OPINIONS BELOW

The District Court's decision denying petitioners' motions to dismiss, 945 F. Supp. 1355 (D. Or. 1996), and the District Court's initial injunction, 1999 WL 65450 (D. Or. Feb. 25, 1999), are appended hereto ("Resp. App.").[1]

COUNTERSTATEMENT OF THE CASE[2]

In 1993, as anti-abortion violence became increasingly brutal, "wanted" posters targeting Dr. David Gunn, with his photograph, addresses and other personal information, were circulated where he lived and worked. On March 10, 1993, Dr. Gunn was murdered while entering his abortion clinic. Then, "wanted" posters of Dr. Wayne Patterson, another abortion provider, were circulated, with Dr. Patterson's personal identifying information. In August 1993, Dr. Patterson was murdered. Then, Paul Hill, closely-tied to petitioners, circulated "wanted" posters of Dr. John Britton, another abortion provider, containing his photograph, his home and office addresses, a physical description of him and his car, and accusing him of "crimes against humanity." On July 19, 1994, Hill murdered Dr. Britton and his volunteer escort, James Barrett, and wounded Mr. Barrett's wife, in their car outside the health clinic where Dr. Britton performed abortions. Petitioners responded to all of this by calling for the acquittal of the shooters, asserting that murdering physicians who perform abortions is

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[1] Citations to ACLA's petition and appendix are denoted as "Pet." and "Pet. App." Respondents — four physicians and two health clinics — are referred to collectively as "Physicians" and petitioners are referred to collectively as "ACLA."

[2] Respondents disagree with petitioners' statement of the facts. The "core constitutional fact" of true threats is not "undisputed." (*See* Pet. 1) The facts, summarized here, are set forth in the decision below (Pet. App. 1a-52a), the District Court's injunction (Pet. App. 132a-184a) (with record cites therein), the trial transcript ("Tr.") and the trial exhibits ("Ex.").

"justifiable," and then forming their new organization to repeat the pattern. (Pet. App. 9a-10a, 140a-142a)

Petitioners were fully aware of the poster/murder pattern and the fear in its wake — and they capitalized upon it to intimidate the living physicians by threats of bodily injury. (Pet. App. 12a) In January 1995, having split from the mainstream anti-abortion movement because it refused to endorse violence (Pet. App. 10a, 144a), petitioners unveiled, in blown-up form, their "Deadly Dozen" hit list of thirteen physicians, including three respondents, accusing them of "crimes against humanity." (Pet. App. 10a-11a, 135a-136a) The FBI and U.S. Marshals immediately contacted respondents, who, with full knowledge of the prior poster/murder pattern and petitioners' "pro-force" position, purchased bulletproof vests, wigs and disguises. (Pet App. 10a-13a, 41a, 135a-137a)

ACLA's threats continued unabated. In August 1995, ACLA released a poster of respondent Dr. Robert Crist, with his photograph and home and work addresses, declaring him "guilty of crimes against humanity" and offering a "reward." Petitioners visited Dr. Crist's St. Louis clinic to relay their threat directly.[3] Once again, petitioners succeeded in their intent to intimidate: Dr. Crist accepted law enforcement protection and undertook additional security measures to protect himself and his family. (Pet. App. 11a, 137a)

In January 1996, ACLA unveiled "the Nuremberg Files." (Pet. App. 11a) Subsequently, petitioners sent the Nuremberg Files to Neal Horsley for placement on the internet in ACLA's name. Horsley complied. (Pet. App. 11a, 137a-140a) Amidst dripping blood, crossed-out names of murdered doctors and grayed names of wounded doctors, the Nuremberg Files threatened that Physicians would be subject to punishment by "perfectly legal courts" for "various crimes to which they

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[3] Petitioners' visit to the St. Louis courthouse was not a "rally." (Pet. 2)

should answer." The Nuremberg Files contained Physicians' names, addresses and family information, and warned of a "payday someday, a day when what is sown is reaped." (Pet. App. 11a-12a, 32a, 193a-194a)[4]

Fearing for their lives and the safety of their families, respondents sued, contending that petitioners' communications to Physicians were "threats of force" in violation of federal law.[5] Relying on settled threats law under multiple federal threats statutes (on which FACE was modeled), the District Court denied ACLA's motions to dismiss and, after discovery, denied ACLA's motions for summary judgment. (Resp. App. 1a-63a; Pet. App. 185a-212a) After three weeks of trial and four days of deliberations, the jury found on a special verdict form that each of the Deadly Dozen List, Crist Poster and Nuremberg Files constituted "a true threat by one or more of the defendants to bodily harm, assault or kill any one of the plaintiffs." (Pet. App. 249a; Resp. App. 75a)[6] The jury also found that petitioners intended to intimidate Physicians,

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[4] ACLA struggles to distance itself from the Nuremberg Files by noting that Horsley, who currently maintains the website, is a non-party. It is undisputed that the Nuremberg Files were petitioners' creation. (Pet. App. 11a, 138a-140a, 175a-178a) ACLA's "Lodging" does not include the trial exhibits documenting ACLA's role in creating the Nuremberg Files or ACLA's involvement in the internet version. (*E.g.*, Exs. 4, 7B, 80) Moreover, Paul deParrie, petitioners' agent, was directly involved in the creation of the Nuremberg Files and participated in the destruction of the hardcopy Files. (Pet. App. 43a-44a, 175a-178a)

[5] Physicians sued under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, and the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, with Hobbs Act extortion, 18 U.S.C. § 1951, as the predicate acts for the RICO claim. The petition does not raise any statutory or facial challenge to either claim.

[6] Petitioners did not include the full jury verdict form, on which, in addition to the "true threat" questions, the jury assessed each claim as to each plaintiff and each defendant. (Resp. App. 75a-91a)

committed extortion and acted maliciously and in reckless disregard of Physicians' rights. (Pet. App. 42a, 254a, 257a-258a; Resp. App. 77a-90a)[7]

In enjoining petitioners from further unlawful conduct, District Judge Robert E. Jones independently found,

> by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices or procedures.
>
> . . . I find the actions of the defendants in preparing, publishing and disseminating these true threats objectively and subjectively were not protected speech under the First Amendment.

(Resp. App. 65a; Pet. App. 13a) The District Court followed with additional findings of fact. (Pet. App. 132a-184a)[8]

In its findings, the District Court found both subjective and objective intent to threaten on behalf of each petitioner.

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[7] ACLA states incorrectly that the verdict was $120 million. (Pet. 5) ACLA appears to count the compensatory damages multiple times. The majority of the verdict was punitive damages under FACE, assessed separately as to each of the fourteen defendants and which are the subject of the Ninth Circuit's remand. (*See* Resp. App. 75a-91a)

[8] The District Court issued its injunction under FACE, which specifically authorizes private parties to obtain injunctive relief. 18 U.S.C. § 248(c)(1)(B). No RICO injunction was sought in this case.

(Pet. App. 13a, 135a-137a, 179a; Resp. App. 65a) The District Judge expressly found not credible petitioners' claims that the posters and the Nuremberg Files were merely a form of political protest. (Pet. App. 179a; Resp. App. 65a) The jury's finding of intention to intimidate under FACE and its decision to award punitive damages reflects a similar credibility determination. (Resp. App. 77a-90a; Pet. App. 8a, 27a, 34a)

ACLA appealed. In an opinion by Judge Kozinski, a three-judge panel reversed, ruling that ACLA must threaten that it or its agents personally will commit the threatened violence.[9] The Ninth Circuit reheard the case *en banc*. In an opinion authored by Judge Rymer, joined by Chief Judge Schroeder and Judges Hawkins, Silverman, Wardlaw and Rawlinson, the *en banc* majority found that petitioners, with intention to intimidate, threatened violence, and affirmed the liability verdict and injunction, and remanded to the District Court for further proceedings on the amount of the punitive damages award.[10]

In her opinion for the *en banc* majority, Judge Rymer carefully surveyed the uniform body of threats law developed in the Ninth Circuit and the other Circuits following this Court's decision in *Watts* v. *United States*, 394 U.S. 705 (1969), and determined that the District Court properly defined "threat" for purposes of this case. (Pet. App. 22a-31a) The court held that, under well-settled law, the jury properly considered context in determining whether petitioners' statements were "true threats."

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[9] *See* note 33, *infra*.

[10] Those proceedings have not occurred and, thus, there is no final judgment in this case. *See Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948) (holding that a judgment is not final "where liability has been determined and all that needs to be adjudicated is the amount of damages"). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co*, 389 U.S 327, 328 (1967).

(Pet. App. 30a-33a) The court further found that the FACE instructions required the jury to find that petitioners issued their threats with an intent to intimidate respondents — that is, that they subjectively intended to cause respondents to fear bodily injury. (Pet. App. 8a, 27a, 33a-34a)

Judge Rymer's majority opinion carefully explored the law governing the proper standard of review in cases implicating the First Amendment to determine what standard should apply in this case. (Pet. App. 13a-20a) As ACLA had urged, the court resolved to review the record independently to satisfy itself that the core constitutional fact — whether a true threat was made — had been established. The court then searched the factual record (*e.g.*, Pet. App. 9a-13a, 31a-33a, 39a-41a), deferring to the factfinder on issues of credibility, as this Court's precedents require. Convinced independently that ACLA's statements were unlawful true threats (and that no other trial errors had occurred), the Court of Appeals affirmed the liability verdict and the injunction.[11]

Although disagreeing with the result, the dissenting Judges — Judges Reinhardt, Kozinski, O'Scannlain, Kleinfeld and Berzon — agreed that the majority properly defined the standard for true threats, properly approved the jury's consideration of context, and properly held that the case required an independent review of the factual record. (Pet. App. 53a-55a, 69a n.1) The dissenting opinions simply disagreed with the application of those settled legal standards to the particular facts of this case. (*E.g.*, Pet. App. 53a)[12]

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[11] Petitioners do not seek review of any of the rulings on evidentiary or trial matters. In a footnote (Pet. 26 n.11), ACLA quibbles about the FACE conspiracy claim, but that argument indisputably was waived, as the decision below noted. (Pet. App. 50a n.16)

[12] In addition to joining Judge Kozinski's dissent, which agreed with the majority's articulation of threats law and standard of review, Judges Reinhardt and Berzon authored separate dissents. Judge Reinhardt

Petitioners' request for rehearing was denied, with only Judges Kozinski and O'Scannlain voting for rehearing. (Pet. App. 220a)

REASONS FOR DENYING THE PETITION

There is no reason to grant — and every reason to deny — ACLA's petition.

ACLA's petition takes issue only with the factbound application of settled law, which is not a proper basis for review by this Court. It is settled that "true threats" are not protected by the First Amendment. And all Circuits apply — as did the Ninth Circuit here — an objective, reasonable person test to determine whether a true threat exists. All Circuits also agree that context must be considered in determining whether a statement is an unlawful true threat, as the Ninth Circuit considered here. And there also is no dispute that in conducting an independent review of the factual record — as the Ninth Circuit conducted here — an appellate court affords additional protection to First Amendment rights.

Indeed, both the majority and dissenting Ninth Circuit Judges *agreed* on the applicable legal standards. The only issue posed by the petition is how settled law should be applied to the particular facts of this case. This is not a basis for Supreme Court review. *See* Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *C.J.D. Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (dismissing writ where question turned on review of factual findings).

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argued that "political speech" deserves "heightened scrutiny." *See* note 20, *infra*. Judge Berzon advocated a subjective intent standard. *See* note 21, *infra*.

The petition itself struggles to identify a certworthy issue. It lists seven similar Questions Presented for Review ("QP"), each of which is intricately factbound. Each does no more than express the same disagreement with the Ninth Circuit's application of settled law to the facts of this case. Review should be denied.

I. PETITIONERS' "FORMAT" ARGUMENT PRESENTS NO LEGAL ISSUE FOR SUPREME COURT REVIEW

A. The Court of Appeals Properly Applied the Settled Legal Standard for True Threats of Violence

ACLA devotes the majority of its petition (and four Questions Presented) to a complaint that the Court of Appeals created a "novel" theory of threats law that premises liability on the "format" of speech rather than its content. Not so. The Ninth Circuit applied settled threats law — as to which there is no conflict of authority — and properly evaluated petitioners' posters in the course of its independent review of the factual record. This is not a legal issue, much less a novel one.

It is settled that "true threats" of violence are outside the bounds of protected speech. *Watts*, 394 U.S. at 707; *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994). Similar to the many other federal threats statutes, under FACE, "[w]hoever by force of threat of force . . . , intentionally injures, intimidates . . . any person because that person is or has been, or in order to intimidate such person . . . from, obtaining or providing reproductive health services," may be subject to civil and criminal penalties. 18 U.S.C. § 248(a)(1). There can be no dispute — and ACLA raises none — that FACE, like the many other threats statutes, is facially constitutional, as it proscribes threats of violence and explicitly disclaims any proscription of

First Amendment activity. 18 U.S.C. §§ 248(a), 248(d)(1). (*See* Pet. App. 50a n.15; Resp. App. 29a-41a)[13]

To determine whether statements constitute a true threat and not protected speech, the Ninth Circuit — and every other Circuit — repeatedly and consistently has applied an objective, reasonable person test. (*See, e.g.*, Pet. App. 25a-27a (canvassing Ninth Circuit threats cases), Pet. App. 46a-47a n.7 (citing cases from each Circuit applying objective standard to determine whether a statement is a true threat)) ACLA's petition virtually ignores this uniform body of law.[14]

Consistent with this precedent, in this case, the Ninth Circuit defined a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to

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[13] *Accord* 18 U.S.C. § 115 (prohibiting threats to assault, kidnap or murder a federal judge or federal official); 18 U.S.C. § 175(a) (prohibiting threats to develop, acquire or possess biological weapons); 18 U.S.C. § 245(b) (prohibiting threats of force to intimidate one from exercising federal rights); 18 U.S.C. § 871 (prohibiting threats of violence against President or Vice President); 18 U.S.C. § 875(c) (prohibiting interstate transmission of threat to injure another); 18 U.S.C. § 1993(a)(8) (prohibiting threats to commit terrorist acts or other acts of violence against mass transportation systems); 18 U.S.C. § 2332a (prohibiting threats to use weapons of mass destruction); 42 U.S.C. § 3631 (prohibiting threats made to intimidate a person from exercising right to fair housing because of race). (*See also* Pet. App. 205a-206a for District Court's analysis comparing FACE with 42 U.S.C. § 3631.)

[14] The consistency of the law was most recently articulated by the Eighth Circuit, *en banc*, in *Doe* v. *Pulaski County Special School District*, 306 F.3d 616, 622 (8th Cir. 2002). The only difference among the Circuits is that some apply a "reasonable listener" test, while the majority, including the Ninth Circuit, apply a more speech-protective "reasonable speaker" test. *See id.* In this case, the more speech-protective test was applied, and petitioners in no way suggest that anything turns on the different wording. (Pet. App. 47a-48a n.7)

inflict bodily harm upon that person." (Pet. App. 28a)[15] After reviewing the record independently, the majority correctly determined, as had the jury and District Court Judge, that a reasonable speaker in ACLA's position would reasonably foresee — indeed, could only believe — that respondents would perceive ACLA's statements as a serious expression of an intent to do them bodily harm. Thus, ACLA's statements constituted unprotected threats of violence, and not protected speech. (Pet. App. 19a-20a, 40a-41a)

With no conflict in the law, ACLA appears to be disputing the common-sense notion that in evaluating whether something is an unprotected "true threat," courts should consider its context. That, presumably, is why ACLA disputes the Court of Appeals' consideration of the broader backdrop to petitioners' statements, which included murders of abortion providers following their being targeted in a wanted poster "format" — as well as abundant other evidence of the facts and circumstances surrounding ACLA's statements. (*See* Pet. App. 9a-13a (summarizing facts and referencing District Court's injunction (Pet. App. 132a-184a) for full discussion of facts)) As both the Ninth Circuit majority and dissenters agreed, however, the law is settled that context must be considered as part of the threats analysis. (Pet. App. 30a, 53a, 69a n.1)

Indeed, this Court itself already has held that, in a threats case, context can be decisive. In *Watts*, during a rally at the Washington Monument, the defendant stated:

> I have already received draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.

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[15] Judge Kozinski noted that the majority "correctly distill[ed]" this standard "[a]fter meticulously canvassing the caselaw." (Pet. App. 53a)

394 U.S. at 706. In reversing the conviction, this Court found the context of Watts' remarks determinative: it concluded that the facially threatening statement was actually a joke because the young crowd, a discussion group during a rally at the Washington Monument, laughed in response, and the statement was expressly conditional upon the occurrence of an event — induction into the armed forces — that the defendant guaranteed would never happen. *Id.* at 707-08.[16]

Since *Watts*, *all* Circuits have held that context must be examined to determine whether speech is protected or is an unlawful true threat. *See, e.g.*, *Doe* v. *Pulaski*, 306 F.3d at 626-27 (considering nationwide context of school violence and finding a threat); *United States* v. *Hart*, 212 F.3d 1067, 1072-73 (8th Cir. 2000) (considering Oklahoma City bombing as context supporting conviction of anti-abortion activist who used Ryder truck to intimidate); *United States* v. *Khorrami*, 895 F.2d 1186, 1188 (7th Cir. 1990) (considering context of worldwide anti-Semitic violence in finding "wanted" posters mailed to Jewish National Fund were true threats). *See also Schenck* v. *Pro-Choice Network of Western New York*, 519 U.S. 357, 395 (1997) ("Words take on meaning from context.") (Breyer, J., concurring and dissenting in part).

Nonetheless, as they did below, petitioners assert that their statements cannot be deemed true threats because they did not contain an "overt" threat. (Pet. 7-8, 12) But threats law does not require such literal specificity. Without context, clever threateners can with impunity utilize subtle methods of intimidation to make their targets fear violence. A threat that does not say, in so many words, "I'm going to kill you," can be very much a threat. Certainly, symbols can become true threats if targets who failed to heed the warning were killed. *See, e.g.*, *Garrovillas* v. *INS*, 156 F.3d 1010 (9th Cir. 1998) ("The letter

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[16] ACLA's posters were not conditional and they certainly were not met with laughter. (Pet. App. 11a-13a, 40a-41a)

contained a black ribbon, which Garrovillas understood to be the NPA's symbol for a death threat."). As the *en banc* majority wrote, "without context, a burning cross or a dead rat mean nothing." (Pet. App. 31a) The dissenters agreed. (Pet. App. 54a, 69a n.1, 85a) Thus, ACLA's mantra — that its posters contained no expressly "threatening language" — fails to come to grips with the settled law of threats.[17]

In short, ACLA's contention that the Ninth Circuit's consideration of the known poster/murder pattern as part of the context caused them to be held liable improperly for the "format" of their posters rather than their threatening message is merely an effort to evade the uncontroversial, settled legal principles that defeat petitioners' claims. It also is an effort to avoid the multitude of contextual facts that convinced a jury and District Court Judge that petitioners threatened to kill respondents. There is no basis for this Court to review that settled law or these particular facts.[18]

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[17] As the *en banc* majority noted, petitioners were well aware of their posters' message. Petitioner Bray gloated that a doctor who quit performing abortions after being targeted by petitioner Crane on a "wanted" poster was "bothered and afraid." (Pet. App 12a, 150a) Writing about the murder of Dr. Gunn and the "wanted" posters being made of his replacement, petitioners boasted that "many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." (Pet. App. 12, 147a) Speaking of the Deadly Dozen list, Petitioner Burnett testified, "I mean if I was an abortionist, I would be afraid." (Pet. App. 12a, 154a) Crane himself kept a "wanted" poster bearing his name in a file he labeled "death threats." (Pet. App. 157a)

[18] Contrary to the suggestion in ACLA's petition (Pet. 11), Physicians did not raise the poster/murder pattern for the first time on appeal. Indeed, as the District Court's decision on petitioners' motions to dismiss shows, the context into which ACLA released its threats has always included the fact that three abortion providers were murdered after being targeted on "wanted" posters. (Resp. App. 3a-6a) Although petitioners now attempt to distinguish their posters, petitioner David Crane, ACLA's National Director, admitted under oath that "wanted" and "guilty" posters had the same impact. (Pet. App. 10a, 157a)

B. Threats of Violence Are Not Protected Even if Uttered in a "Political" Context

Threats of violence are not protected, and the speaker's political agenda does not change this settled principle. (Pet. App. 41a-42a, 48a) Most threats against government leaders are "political." Further, whether a threat is distributed publicly or privately is part of the contextual analysis, but does not change the test for true threats.[19] The objective standard controls the threats determination irrespective of the speaker's particular political views or method of communication. *See, e.g., Madsen*, 512 U.S. at 773 (stating, in a case involving abortion protesters, that "threats . . . however communicated, are proscribable under the First Amendment"); *United States* v. *Viefhaus*, 168 F.3d 392, 395-96 (10th Cir. 1999) (assessing statements on white supremacist hotline under objective standard and affirming threats conviction); *United States* v. *Gilbert*, 884 F.2d 454, 457-58 (9th Cir. 1989) (applying objective test in finding statements opposing interracial adoption were threats).

In *all* political movements, those *who threaten violence* lose constitutional protection. Here, ACLA made its threats in the context of an atmosphere of brutal violence against abortion providers. "[U]tterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." *Milk Wagon Drivers* v.

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[19] That ACLA did not send its threats in the mail to respondents does not render them protected speech. (Pet. 15) As the decision below noted, ACLA's threats were "publicly distributed but personally targeted." (Pet. App. 41a) They were true threats. *Cf. Hess* v. *Indiana*, 414 U.S. 105, 108-09 (1973) (reversing disorderly conduct conviction where statements were "not directed to any person or group of persons").

Meadowmoor Dairies, 312 U.S. 287, 293 (1941) (affirming labor injunction); *accord Madsen*, 512 U.S. at 774.[20]

II. THE COURT OF APPEALS PROPERLY REAFFIRMED THE SETTLED OBJECTIVE STANDARD — AND CORRECTLY FOUND BOTH OBJECTIVE AND SUBJECTIVE INTENT

Despite settled law, ACLA asks this Court to grant review in order to change the law of all Circuits to require subjective intent for "true threats" — a standard that was, in any event, met in this case.[21] ACLA bases this request on Justice Marshall's concurrence in *Rogers* v. *United States*, 422 U.S. 35 (1975). In *Rogers*, this Court reversed the defendant's conviction for threatening the life of the President in violation of 18 U.S.C. § 871, finding prejudicial error in the trial court's communications with the jury. In concurring, Justice Marshall stated that he would require "proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Rogers*, 422 U.S. at 48. This Court has never adopted that view.[22]

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[20] Judge Reinhardt argued that "political speech" deserves "heightened scrutiny." (Pet. App. 52a) As explained *infra*, ACLA's speech was accorded heightened scrutiny — and still found to be threatening.

[21] ACLA's petition makes clear that its proposed subjective intent requirement would derive not from any statute but rather from the First Amendment. (Pet. 21-22) Judge Berzon's dissent takes the same view. (Pet. App. 83a-86a) Thus, adoption of a subjective intent standard in this case necessarily would make subjective intent the constitutional intent requirement for all threats statutes, including those that proscribe threats against the President and contained in anti-terrorism laws. *See* note 13, *supra*. Defendants in all of these contexts would contend that they merely are engaging in protected political speech.

[22] All Circuits – and both the majority and dissenters below – agree that the speaker's intention to carry out the threat is *not* required. (Pet. App. 26a-27a, 29a, 69a n.1, 105a n.8)

Indeed, not a *single* Court of Appeals to consider Justice Marshall's subjective test has elected to embrace it. *See United States* v. *Aman*, 31 F.3d 550, 556 (7th Cir. 1994) (reaffirming objective standard and stating: "Although we owe the view of a single Justice great respect, we cannot treat it as stating the governing law. . . [T]he weight of authority is to the contrary."); *United States* v. *Johnson*, 14 F.3d 766, 769-71 (2d Cir. 1994) (rejecting subjective threats standard); *United States* v. *Kosma*, 951 F.2d 549, 556-57 (3d Cir. 1991) (same); *United States* v. *Manning*, 923 F.2d 83, 85 (8th Cir. 1991) (same and noting that "the trend towards an objective standard has persisted"); *United States* v. *Welch*, 745 F.2d 614, 618-19 (10th Cir. 1984) (same). (*See also* Pet. App. 48a n.10 (citing cases rejecting subjective intent standard))

And a subjective standard makes no sense. Statutes that proscribe threats are meant to prevent the harms and disruptions associated with the threat itself. The settled objective test employed by all Circuits recognizes this by prohibiting those statements that a reasonable speaker would foresee as threatening. (Pet. App. 26a-28a) A different test would only grant license to clever threateners who will then later claim that they did not subjectively intend to threaten — thereby increasing the prosecutor's burden of proof. Moreover, as the *en banc* majority explained, factors such as the speaker's subjective intent or ability (or inability) to do the harm are already part of the threats analysis and "go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm." (Pet. App. 28a) Further, in this case, respondents proved that the context evidence was "within the knowledge of the defendants." (Pet. App. 252a) This is not a "negligence" test, as ACLA suggests. (Pet. 21-22)

ACLA's argument regarding the standard of intent is further unavailing as a basis for certiorari *in this case* because — as the Ninth Circuit majority explained — both the jury *and* the District Court found specific intent. (Pet. App. 8a,

13a) As Judge Rymer's opinion points out, in addition to the finding of a true threat under the objective standard, the jury instructions in this case for the statutory elements of FACE — which ACLA ignores entirely — required intent to intimidate and thus satisfied any specific intent standard.[23] (*See* Pet. App. 27a, 41a; *see also id.* at 34a (approving FACE jury instruction)) Under FACE, "'intimidate' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. § 248(e)(3). The *en banc* majority, reviewing the record independently, agreed with the jury's finding of "a true threat to intimidate." (Pet. App. 45a) This Court should not review an issue that would have no impact on this case. *See Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (dismissing writ as improvidently granted where "the record does not fairly present the question").

That the injunction includes a specific intent requirement for restrained future conduct does not signify a departure from the objective standard for defining "true threats," as ACLA contends. The injunction enjoins petitioners only from the same activity that was found unlawful, evidencing the District Judge's careful efforts to narrowly tailor the injunction to prohibit no more speech than necessary. As the *en banc* majority held, "[t]he terms of the injunction are finely tuned and exceedingly narrow. Only threats or use of the posters or their equivalent with the specific intent to threaten Crist, Hern, either Newhall, PPCW or PFWHC are prohibited. Only personal information about these particular persons may not be used in the Nuremberg Files with the specific intent to threaten them.

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[23] This was the position of the American Civil Liberties Union, as *amicus curiae*, which urged the Ninth Circuit to affirm on the ground that specific intent had been found. (Pet. App. 27a, 46a n.6) The ACLU, in proposing a subjective intent test, further recognized that adoption of such a test would be a change in settled law. (Pet. App. 199a-200a) In asserting that "intent to intimidate is not the same as intent to threaten force" (Pet. 23 n.10), ACLA ignores FACE's definition of "intimidate," on which the jury was instructed. (Pet. App. 27a, 34a, 254a)

This leaves huge room for ACLA to express its views." (Pet. App. 44a) The District Court's abundance of caution clearly satisfies this Court's precedents reconciling important protections afforded by injunctions with the expressive rights of the enjoined party. *See Madsen*, 512 U.S. at 765.[24]

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE SECOND CIRCUIT'S DECISION IN *UNITED STATES* V. *KELNER*

Petitioners contend that the Ninth Circuit's decision conflicts with the Second Circuit's decision in *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir. 1976). (Pet. 24; Pet. QP 5) There is no conflict. (Pet. App. 30a)

In *Kelner*, a Jewish Defense League activist stated on television that his organization was "planning to assassinate Arafat." Like the Ninth Circuit did in this case, the Second Circuit applied an *objective* standard taking into account context. Petitioners cite an excerpt from the following:

> So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

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[24] Although mentioned in its seventh Question Presented, ACLA does not seek review of the scope of the injunction. Under this Court's precedents, the injunction clearly is not an unlawful prior restraint, as it followed a finding of past illegal conduct. *Madsen*, 512 U.S. at 764 n.2 (no prior restraint where injunction issued because of prior unlawful conduct); *Schenck*, 519 U.S. at 374 n.6 (rejecting argument that all injunctions are improper prior restraints where injunction prohibited conduct previously adjudicated and found unlawful).

534 F.2d at 1027. This statement emerged from the *Kelner* court's discussion of the need for that defendant's facially threatening language to be a true threat *in its context*. *See Watts*, 394 U.S. at 706-08. Based on the context surrounding Kelner's statements, the Second Circuit *affirmed* the threats conviction.

The Second Circuit's standard does not differ from that of the Ninth Circuit or any other Circuit. (Pet. App. 30a, 198a-199a) In the quarter of a century since *Kelner*, the Second Circuit — like all other Circuits — has developed an objective standard that takes context into account. *See United States* v. *Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) ("[t]he test is an objective one — namely, whether an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury") (quoting *United States* v. *Malik*, 16 F.3d 45, 50 (2d Cir. 1994)). The Second Circuit fully recognizes the importance of context in veiled threats cases. *Malik*, 16 F.3d at 50. And, the Second Circuit routinely cites *Kelner* in *approving* threats charges and *affirming* convictions. *See, e.g, id.*; *United States* v. *Francis*, 164 F.3d 120, 123 (2d Cir. 1999); *Sovie*, 122 F.3d at 125.[25]

The objective test enunciated and applied by the Ninth Circuit in this case is fully consistent with the threats jurisprudence of all other Circuits. *See generally Doe* v. *Pulaski*, 306 F.3d at 622 (noting that "[a]ll the courts to have reached the issue [of threats] have consistently adopted an

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[25] *Spitzer* v. *Operation Rescue*, 273 F.3d 184 (2d Cir. 2001), also does not spell a conflict of authority. (*See* Pet. 24) In largely affirming the district court's preliminary injunction against an anti-abortion activist, the *Operation Rescue* court expressed concern, in *dicta*, that the *evidence* before the district court might not have satisfied the threats standard. *Id.* at 196. ACLA's petition does not articulate why *Operation Rescue* presents any conflict with the decision below. It does not. *Operation Rescue* demonstrates only that a threats finding requires examination of all the facts and circumstances surrounding a particular statement, as the Ninth Circuit majority did here.

objective test . . . "). To the extent the Second Circuit were to hold (which it has not done) that its test differs from that of all the other Circuits, any such conflict should be addressed in reviewing a case decided by the Second Circuit. *See Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (dismissing writ as improvidently granted where circuits "were really in harmony and not in conflict").

IV. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

Petitioners also struggle to conjure a conflict between the Ninth Circuit's decision and decisions of this Court. There is none.

A. The Decision Below Is Not "Unconstitutionally Vague"

ACLA posits that the decision below suffers from "unconstitutional vagueness," contending that the *en banc* majority's application of the settled threats standard to the facts of this case is "a standardless speech restriction." (Pet. 14-15) This confused argument does not merit review either.

The vagueness doctrine prohibits the government from enacting laws under which persons "'of common intelligence must necessarily guess at its meaning.'" *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971) (striking down ordinance prohibiting persons from assembling and conducting "themselves in a manner annoying to persons passing by" as specifying "no standard of conduct" at all) (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)).

The petition, however, does not raise a vagueness challenge to any statute — and indeed petitioners state that this case is *not* about statutory construction. (Pet. 13) In particular, petitioners do not attack the facial constitutionality of FACE, which contains language almost identical to the many other

federal threats statutes. *See* note 13, *supra*.[26] Instead, ACLA's "vagueness" challenge appears to be to the Ninth Circuit's decision itself. This "vagueness" challenge does not provide a legal issue for this Court to review either.

The Court of Appeals determined that in context — context that was within petitioners' *and* respondents' knowledge (Pet. App. 12a-13a) — ACLA's wanted posters and the list of Physicians in the Nuremberg Files constituted true threats of violence. This finding is not "vague" — it simply is not the outcome petitioners desired. Once again, ACLA's position — now swathed in the cloak of "vagueness" — is that its view of the facts should prevail instead of the view taken by the jury, the District Court and the *en banc* majority. There is no basis for review here. *Johnston*, 268 U.S. at 227 ("We do not grant a certiorari to review evidence and discuss specific facts.").[27]

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[26] *See, e.g., Norton* v. *Ashcroft*, 298 F.3d 547 (6th Cir. 2002) (holding that FACE is constitutional and collecting cases). The District Court rejected ACLA's facial challenges to FACE (Resp. App. 29a-41a), and petitioners did not appeal on that issue (*see* Pet. App. 50a n.15, 51a n.17.).

[27] ACLA asserts that the Ninth Circuit's singular use of the phrase "in conjunction with" constitutes the adoption of a new theory of law, which of course it does not. (Pet. 9, 14, 25; Pet. App. 45a) As explained by the *en banc* majority and throughout this brief, the jury was properly instructed under settled threats law, and the *en banc* majority, in reviewing the record independently, explained why the Nuremberg Files, which were unveiled after petitioners' Deadly Dozen List and Crist Poster, properly were found to be a true threat "in conjunction with" those prior facts. This factual analysis was entirely appropriate — and correct. There simply is no basis for a new trial with new jury instructions, as ACLA also suggests in a last-ditch effort to retry this case. (Pet. 26; Pet. QP 4) As the court below held, there was no error in the jury instructions, which included several requested by petitioners on the First Amendment. (Resp. App. 73a-74a; Pet. App. 34a-35a)

B. There Is No Conflict With *Brandenburg* v. *Ohio*

ACLA contends that the Ninth Circuit has "implicitly reject[ed]" *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). (Pet. 16) It clearly has not. (Pet. App. 21a-22a)

In *Brandenburg*, decided in the same term as *Watts*, this Court held that Ku Klux Klan members were engaging in protected advocacy when they made racial epithets at a rally. (Pet. App. 21a) Relying on that case, petitioners argue that only speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action" is actionable. (Pet. at 16) Petitioners ignore the distinction between threats and incitement. *See United States* v. *Dinwiddie,* 76 S.3d 913, 922 n.5 (8th Cir. 1996). (*See also* Pet. App. 80a-81a (Judge Berzon's discussion of distinction between threats and incitement); Resp. App. 24a n.13))

ACLA was not held liable for inciting acts by others — it was held liable for its true threats of violence. *Brandenburg* governs incitement. *Watts* and its progeny govern threats. FACE is a threats statute governed by *Watts* and its progeny. Indeed, recognizing this very distinction, ACLA urged the District Court to instruct the jury on the difference between threats and incitement, and received the precise instruction it requested. (Resp. App. 73a-74a; Pet. App. 82a, 105a n.7)

ACLA's contention that its statements incited no violence is thus wholly beside the point. "True threats" are proscribable if — as here — they are directed at specific targets whom the speaker should foresee would take the statements as a serious expression of an intent to do bodily harm. (Pet. App. 25a–26a) True threats are proscribed to protect "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388

(1992).[28] Here, Physicians contended —and proved — that ACLA threatened them with violence, not that third parties were incited to commit that violence. (Resp. App. 73a-74a) Indeed, if a threatener's words provoke enough fear, physical violence — by anyone — to carry out the threat is unnecessary, as the threatener's terrorist purpose is accomplished. *See, e.g., United States* v. *Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985).[29]

C. There Is No Conflict With *NAACP* v. *Claiborne Hardware*

ACLA contends that the decision below conflicts with *NAACP* v. *Claiborne Hardware*, 458 U.S. 886 (1982). The Ninth Circuit majority fully analyzed the facts of that case against the very different facts of this case. (Pet. App. 23a-25a) Petitioners' disagreement with the result of that factual analysis presents no question for review.

In *Claiborne Hardware*, white business owners — not purporting to be the subjects of any threats — sued the NAACP and NAACP official Charles Evers for damages resulting from an extended boycott of white-owned businesses in the late 1960s. 458 U.S. at 889-80. The Mississippi state courts awarded damages under tort and antitrust theories for "lost business earnings and lost goodwill during a 7-year period." *Id.* at 893. This Court reversed.

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[28] This case does not present the issues to be considered by this Court in *Virginia* v. *Black*, No. 01-1107. ACLA does not raise a content or viewpoint neutrality challenge, which is the focus of *Black*.

[29] ACLA appears to argue that this Court should adopt a standard for threats that requires *Brandenburg*-like imminence *plus* specific intent. (Pet. 25) This novel standard has never been adopted by *any* court. Indeed, even Judge Berzon's dissent, which urges a significant departure from established law and the adoption of a subjective intent requirement, does not go that far. (Pet. App. 80a)

The *Claiborne* Court made clear that those who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." 458 U.S. at 926. But, because "all of [the merchants'] losses were not proximately caused by violence or threats of violence," the *undifferentiated* verdict in *Claiborne* — which included damages caused by lawful boycotting and warnings of "vilification or social ostracism" — could not stand. *Id.* at 922. As Judge Rymer's majority opinion pointed out, the "break your neck" comments in *Claiborne* were

> hyperbolic vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.

(Pet. App. 25a)[30]

Thus, the *Claiborne* Court concluded that there was no evidence that Evers' extemporaneous rhetoric authorized or directly threatened violence. If there had been, "the references

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[30] During the *Claiborne* boycott, black boycott violators were noted by "store watchers" and their names were read at NAACP meetings and published in a local paper, "Black Times." 458 U.S. at 903-04. This Court (and the Mississippi courts) viewed these as *demeaning acts of social ostracism*, not as threats of violence. *Id.* at 903-04. Although several "isolated acts of violence" had occurred, *id.* at 922, which included damage to a flower garden, a brick thrown through a windshield and birdshot and pellets fired at the houses of two violators, notably in *Claiborne* — unlike here — no murders of boycott violators had occurred and the targets of Evers' speeches did not wear bulletproof vests or file the lawsuit — they continued shopping at the white merchants' stores. *Id.* at 904.

to discipline in the speeches could be used to corroborate that evidence." 458 U.S. at 929. By contrast here, as the *en banc* majority explained,

> no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed. And they were seriously worried.

(Pet. App. 41a)

Indeed, unlike the targets of Evers' speech — the boycott-breakers who were *not* the plaintiffs in *Claiborne* — respondent Physicians testified about their personal fear following ACLA's threats (and fear of ACLA in particular) and described the extensive security measures they undertook as a direct result of that fear. (Pet. App. 12a-13a, 40a-41a) The prior posters and murders and petitioners' knowing and repeated endorsement of that violence provided further context for the finding of intent to threaten violence that the *Claiborne* facts lacked. (Pet. App. 9a-10a, 12a, 140a-143a, 195a)[31] *Claiborne* did not even involve a true threats analysis under a threats statute. (Pet. App. 24a-25a) There simply is no conflict here

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[31] ACLA incorrectly (and brazenly) states that "ACLA said *nothing* about violence." (Pet. 17) (emphasis in original) Indeed, ACLA was formed precisely because its leaders endorsed violence and called for the acquittal of murderers of abortion providers. As the record also shows, petitioners spoke repeatedly in support of "justifiable homicide" of abortion providers. All of petitioners' "political" statements had violent overtones. (*E.g.*, Pet. App. 9a-12a, 140a-144a)

with the law enunciated in *Claiborne* — the facts and legal bases of the decisions are simply different.[32]

D. There Is No Conflict With *Ashcroft* v. *Free Speech Coalition*

This case does not present any common issue — much less a conflict — with *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389 (2002), decided a month before the decision below and thus fully considered by the Court of Appeals.

In *Free Speech Coalition*, this Court struck down a statute that prohibited simulated child pornography, holding that the connection between the speech at issue there and the harm it may cause was too "contingent and indirect" to justify suppression. 122 S. Ct. at 1401-03. That is not what this case is about. ACLA's posters were found to be threats to kill because ACLA knew that the posters would be perceived as a serious expression of an intent to do bodily harm to Physicians. (Pet. App. 12a) Like the many other federal threats statutes, FACE aims to prevent intimidation by threats of violence. Threats were not at issue in *Free Speech Coalition*.

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[32] Petitioners also assert that the decision below contravenes *Claiborne* by imposing "guilt by association" for posters made by persons who were not ACLA members. (Pet. 19-20) No such liability was imposed in this case. Petitioners were *not* held liable for actions other than their own. ACLA put its name on the three threats at issue, making it directly liable, and all other petitioners were held liable for their personal involvement in making those threats. (Pet. App. 34a-35a) The jury was *expressly* instructed that it could not impose liability on petitioners for the actions of others, mere association, or simply because petitioners' speech was coercive. The jury also was *expressly* instructed that the *only* alleged threats were the Deadly Dozen List, Crist Poster and Nuremberg Files. (Pet. App. 34a-35a, 252a, 256a; Resp. App. 73a-74a) The verdict in this case was not undifferentiated, as in *Claiborne*.

E. The Court of Appeals Properly Conducted an Independent Review of the Factual Record and Correctly Affirmed the Findings of the Jury and District Court

Finally, ACLA claims that the Court of Appeals devised "a novel, deferential standard of First Amendment review" that conflicts with the decisions of this Court and of other Circuits. (Pet. 26-27; Pet. QP 6) Once again, ACLA is trying to manufacture conflict where none exists — this time by distorting the words of the decision below.

As is clear from its opinion, the Ninth Circuit majority "review[ed] the evidence on true threats independently" (Pet. App. 39a), adhering to the standard of appellate review on First Amendment issues set out in this Court's decisions in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), and *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Even the dissenting Ninth Circuit judges agreed that the majority articulated the appropriate standard of independent review. (Pet. App. 54a; *see also id.* 108a n.15) Petitioners (like the dissenting judges below) simply disagree with the *result* of that independent review. This disagreement over the evidence does not warrant certiorari review. *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981) ("we are presented primarily with a question of fact, which does not merit Court review.").[33]

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[33] Judge Kozinski acknowledged that the majority "cite[d] evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat." (Pet. App. 55a) The dissenters simply disagreed with the majority's interpretation of that evidence. (Pet. App. 53a-54a) Judge Kozinski contended that it was not clear from the facts of this case that ACLA or its agents would personally commit the threatened harm. (Pet. App. 56a) As the *en banc* majority's decision

The *en banc* majority carefully articulated and correctly applied the independent review standard enunciated in this Court's precedents, and appropriately deferred on credibility issues.[34] In *Harte-Hanks*, this Court emphasized that, even under the independent review standard, "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses.'" 491 U.S. at 688 (quoting *Bose*, 466 U.S. at 499-500).[35] *See also Hurley*, 515 U.S. at 567 (1995) (although independent review requires appellate courts to "decide for [them]selves whether a given course of conduct falls on the near or far side of the line of

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and the record show, however, the evidence, in fact, was substantial on this issue. ACLA issued its posters with knowledge of the preceding posters and murders, and Physicians "could well believe that *ACLA* would make good on the threat." (Pet. App. 40a) (emphasis added) The verdict form showed the jury's finding that each of the three statements "is a true threat *by one or more of the defendants to bodily harm, assault or kill* one or more of the plaintiffs." (Pet. App. 249a; Resp. App. 75a) (emphasis added) Physicians testified that they feared *these* defendants. Dr. Hern, for example, testified that ACLA's hit lists said "do what we tell you to do, or *we will kill you*. And they do." "This is a hit list and that *these people who made this list will kill me*." "I am fearful for my life, that I am afraid that — *that someone from the group that put out this poster* would be there and would kill me." (Tr. 639, 664; Pet. App. 12a-13a, 40a) (emphases added) These were true threats of violence.

[34] In fact, Judge Kozinski's dissent chastised the majority for wasting space addressing the appropriate standard of review. (Pet. App. 53a, 69a n.1) Each of the cases ACLA cites uses the same standard that the Ninth Circuit applied in this case. (Pet. 29) *E.g.*, *Howard* v. *Antilla*, 294 F.3d 244, 249 n.8 (1st Cir. 2002) ("independent review is subject to limitations and is not equivalent to de novo review of the entire record. For instance, '[p]urely factual determinations, particularly those involving the credibility of witnesses, remain best addressed by the factfinder, and are subject to the usual, more deferential standard of review.'").

[35] In *Harte-Hanks*, this Court expressly refuted the petitioner's contention that it "reject[ed] the trial court's credibility determination in *Bose*." 491 U.S. at 689 n.35. (*See* Pet. App. 15a)

constitutional protection," it "does not limit . . . deference to a trial court on matters of witness credibility"); *Madsen*, 512 U.S. at 769-70 ("deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review.").

Petitioners' contention that the *en banc* majority applied a "substantial evidence" standard — and no more — is a misstatement of Judge Rymer's careful opinion.[36] The court *first* reviewed the jury's verdict "for substantial evidence supporting the historical facts (including credibility determinations) and the elements of statutory liability (including intent)." (Pet. App. 19a) It was only *after* the majority found *substantial* evidence to support the verdict — a standard in itself beyond rational basis review — that the court "review[ed] the record independently in order to satisfy ourselves that the posters and the Files constitute a 'true threat' such that they lack First Amendment protection." (*Id.* 20a) Then, *after* independently reviewing the record, the court itself concluded that "use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat." (*Id.* 44a; *see id.* 39a-42a) This meticulous review fully satisfies this Court's precedents.

At bottom, petitioners' argument reduces to a factbound disagreement over the result of the Ninth Circuit's thorough, independent review of the "true threat" finding. On the law, there is no disagreement. Certiorari review is unwarranted here.

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[36] Indeed, citing to the *en banc* decision in this case, the Ninth Circuit recently reiterated the independent review standard and distinguished that standard from a "sufficiency of the evidence" standard. *See United States* v. *Hanna*, 293 F.3d 1080, 1088 & 1088 n.9 (9th Cir. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 12, 2002

Respectfully submitted,

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APPENDIX A

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; ET AL., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; ET AL., Defendants.

Sept. 18, 1996

Stephen S. Walters, Stoel Rives, Portland, OR, Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, Roger K. Evans, Legal Action for Reproductive Rights, Planned Parenthood Federation of America, Inc., New York City, for Plaintiffs.

William D. Bailey, Bailey & Wolfe, Portland, OR, David T. Daulton, Berean Law Group, P.C., Norfolk, VA, Mark Belz, Belz & Jones, P.C., St. Louis, MO, Norman L. Lindstedt, Lindstedt Buono & Gordon, Portland, OR, Michael P. Tierney, John M. McSherry, Legal Center for the Defense of Life, New York City, Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, for Defendants.

Michael H. Simon, Andrew J. Bowman, Chin See Ming, Perkins Coie, Portland, OR, for Amicus Curiae.

OPINION AND ORDER

ROBERT E. JONES, District Judge:

Plaintiffs filed this lawsuit against Defendants,[1] alleging violations of the Freedom of Access to Clinics Act of 1994 ("FACE"), 18 U.S.C.A. § 248 (1996), the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 (1988), Oregon RICO ("ORICO"), Oregon Revised Statutes ("ORS") 166.720 (1995), and Oregon state tort law. This action is before this Court on Defendants' Motion to Dismiss Plaintiffs' Complaint (#103, #104, #112), and Motion for Judgment on the pleadings (#114).

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[1] "Plaintiffs" include two not-for-profit corporations and several individual Plaintiffs: Planned Parenthood of the Columbia/Willamette, Inc. ("Planned Parenthood"), Portland Feminist Women's Health Center ("Portland Feminist"), Robert Crist, M.D., Warren Hern, M.D., Elizabeth Newhall, M.D., James Newhall, M.D., and Karen Sweigert, M.D.. The two corporate Plaintiffs operate clinics and provide health services including abortions. The individual Plaintiffs are all doctors who perform abortions.

"Defendants" include two Portland-based associations and several individual Defendants: the American Coalition of Life Activists ("ACLA"), Advocates for Life Ministries ("ALM"), Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, Michael Dodds, Joeseph Foreman, Charles McMillan, Stephen Mears, Monica Miller, Bruce Murch, Catherine Ramey, David Stover, Donald Treshman, Charles Wysong. The two associational Defendants oppose abortions and all the individual Defendants have allegedly been involved with ACLA and other anti-abortion organizations. ALM coordinates the Northwest Region of ACLA.

When collectively referring to the individual Plaintiffs or Defendants, they shall be termed "Individual Plaintiffs" or "Individual Defendants."

FACTUAL ALLEGATIONS

Plaintiffs allege that the Individual Defendants formed the American Coalition of Life Activists ("ACLA") with the intention to use "harassment, intimidation and threats of violence in order to cause violent acts and to drive plaintiffs out of business." Compl. ¶ 38. ACLA causes violent acts primarily through publication of "wanted" or "unwanted" posters which mimic law enforcement posters seeking the arrest of criminals. *Id.* ¶ 39. Specifically, in January 1995, ACLA and the Individual Defendants released a "wanted" poster (the "Deadly Dozen List") which listed names, home addresses, and some telephone numbers of thirteen physicians, including three Plaintiffs Hern, Elizabeth Newhall, and James Newhall, who perform abortions. *Id.* ¶ 40-41, Ex. A.

The Deadly Dozen List states that the individuals listed are "Guilty of Crimes Against Humanity" and offers a "$5,000 Reward for information leading to arrest, conviction and revocation of license to practice medicine." *Id.*, Ex. A. Plaintiffs claim that the Deadly Dozen List "suggests an objective that requires the capture and punishment of the individuals named in the poster." *Id.* ¶ 41. Moreover, Plaintiffs state that the Deadly Dozen List is reasonably perceived by Plaintiffs to be a threat of force against Plaintiffs, as demonstrated by the following: (1) Defendants made threatening statements in connection with release of the Deadly Dozen List; (2) in response to release of the Deadly Dozen List, the Federal Bureau of Investigation and United States Department of Justice offered the doctors on the Deadly Dozen List protection 24 hours a day; and (3) attacks on physicians occurred after release of similar type posters. *Id.* ¶ 43. Indeed, Plaintiffs' allegations show a sustained temporal pattern in which a physician is shot to death shortly after his picture appears on a "wanted" poster (Exs. C, D, and E; as alleged *Id.* ¶¶ 53, 55; 56, 58; and 60, 68). Exhibits A and B, like Exhibit E, the distribution of which preceded the

shooting of Dr. Britton, his wife, and volunteer escort, contain the specific language "crimes against humanity." All five posters contain descriptions which specifically identify each physician.

After the Deadly Dozen List was distributed, Defendant McMillian publicly encouraged violence against abortionists on March 27, 1995:

"More violence is inevitable, and it is righteous. * * * It wouldn't bother me if every abortionist in the country today fell dead from a bullet."

Id. ¶ 45 (quoting Defendant McMillian). In addition, Defendant Bray sells bumper stickers that read, "'Execute Murderers-Abortionists.'" *Id.* (quoting Defendant Bray's Bumper Stickers). Both Defendants Crane and Ramey also sported these bumper stickers.

Furthermore, an illustration in the July 1995 issue of the *Life Advocate*[2] depicted a pot of thick liquid on which is drawn a map of four cities where abortionists have been killed. The illustration also depicted several cans, each bearing the name of an abortionist, from which the contents were being poured into the pot. Next to the illustration is a biblical quote referring to the shedding of blood. *Id.* ¶ 46. Plaintiff alleges that "[t]his picture obviously is intended to be an endorsement of the prior murders and shootings of abortion providers and to cause further violence against members of the plaintiff classes."[3] *Id.*

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[2] This magazine is published and distributed by ALM. Compl. ¶ 18. Specifically, Defendant Burnett publishes the magazine, Defendant Ramey is associate editor of the magazine, and Defendant Stover contributes to the magazine. Compl. ¶¶ 20, 29, 30.

[3] On July 9, 1996, Plaintiffs withdrew their class allegations from the Complaint; therefore, allegations which refer to the class shall be

Finally, in August 1995, during a convention in St. Louis, Missouri, "defendants, acting in furtherance of their conspiracy, unleashed a new wave of threatening posters into interstate commerce * * * that target for violence physicians who provide abortions * * *." *Id.* ¶ 47-48. One of the posters targets Plaintiff Crist by including his name, home and work addresses, and his photograph. *Id.* ¶ 48, Ex. B. In addition, during the convention, Defendants released several posters which targeted abortion clinics. *Id.* ¶ 49.

To provide context to Defendants' activities, Plaintiffs also allege several violent incidents involving abortionists and clinics:

(1) in March 1993, Dr. David Gunn was murdered after his name, physical description, address, and description of his car, appeared on an "unwanted" poster, *Id.* ¶¶ 53-55, Ex. C;

(2) in August 1993, Dr. George Patterson was murdered after release of a "wanted" poster containing a description of himself and his car, *Id.* ¶¶ 56-58, Ex. D;

(3) in May 1993, after Defendant Treshman stated that "we have been assured that [Dr. Crist] will be monitored and appropriate action will be taken," a shot gun was fired several times into the children's play-room at Plaintiff Crist's home, *Id.* ¶¶ 59-60;

(4) in August 1993, a member of ALM shot Dr. George Tiller after the *Life Advocate* published several articles about him, and Defendants Bray and Stover praised the shooting, *Id.* ¶¶ 61-62;

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stricken unless they are relevant and apply to the named Plaintiffs in this action.

(5) in July 1994, Dr. James Barrett was murdered after publication of an "unwanted" poster featuring his name, photograph, home address, work and home telephone numbers, and date of birth, *Id.* ¶ 66-68, Ex. E;

(6) in November 1994, after Defendant McMillan stated publicly, "Why would a person [assassinate] publicly, when maybe he could have done it clandestinely, with a high-powered rifle * * *," Dr. Garson Romalis was shot in the leg by a sniper with an assault rifle, *Id.* ¶ 73-74;

(7) in December 1994, after the *Life Advocate* noted that Dr. Britton's murder caused other abortionists to resign, a gunman killed two clinic workers at the Planned Parenthood and Preterm Abortion Clinics in Brookline, Massachusetts, as well as fired shots into the Hillcrest Clinic in Norfolk, Virginia, *Id.* ¶ 77-78.

Plaintiffs contend that "Defendants' unrelenting threats, including and in connection with the repeated distribution of 'unwanted'-style posters, as noted above, has [sic] aggravated the past violence and has [sic] instilled fear in all plaintiffs that more violence is yet to come if defendants are not stopped." *Id.* ¶ 80.

CAUSES OF ACTION

Based on the above allegations, Plaintiffs assert the following seven causes of action:

(1) Defendants have conspired to violate FACE, 18 U.S.C.A. § 248(a)(1), by intending to injure, threaten and intimidate Plaintiffs through the dissemination of "unwanted"-style posters which target abortion providers like Plaintiffs who are

aggrieved persons within the meaning of 18 U.S.C.A. § 248(c)(1)(a);[4]

(2) Defendants violated FACE, § 248(a)(1), by threatening, injuring, and intimidating Plaintiffs because they are providing "reproductive health services";

(3) Defendants, except ACLA, violated RICO, 18 U.S.C. § 1962(c), by participating and agreeing to

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[4] Section 248(a)(1) reads:

(a) Prohibited activities.--Whoever--

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * *.

Section 248(c)(1)(a) provides a right of action:

Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services * * *.

In an action under § 248(c)(1)(a), "the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses." 18 U.S.C.A. § 248(c)(1)(B).

Section 248(e)(5) defines "reproductive health services" as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the *termination of a pregnancy*." (Emphasis added).

participate in the operation or management of ACLA's affairs through a pattern of racketeering activity that involves at least two predicate acts which include publication of the Deadly Dozen List and similar oral or written publications containing threats of force against Plaintiffs;[5]

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[5] Section 1962(c) of RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Furthermore, Defendants' predicate acts include violations of 18 U.S.C. § 1951 (the "Hobbs Act") and ORS 163.275 (Oregon Coercion Statute). Section 1951(a) of the Hobbs Act reads in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section 163.275(1) of the Oregon coercion statute defines the crime of coercion and reads in relevant part:

> (1) a person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:
>
> (a) Unlawfully cause physical injury to some person; or
>
> (b) Unlawfully cause damage to property; or
>
> (c) Engage in conduct constituting a crime; or * * *

(4) Defendants, except ACLA, violated 18 U.S.C. § 1962(d) by conspiring to violate RICO as a result of agreeing to the commission of two or more of the predicate acts;[6]

(5) Defendants violated ORICO, ORS 166.720(3), for the same reasons evinced under Plaintiffs' federal RICO claims;[7]

(6) Defendants violated ORS 166.720(4) by conspiring to violate ORICO; [8]

(7) Finally, Defendants' intentional conduct transgresses the bounds of socially tolerable conduct and caused Plaintiffs to suffer emotional distress which is actionable under Oregon tort law.

Plaintiffs request a declaration that Defendants' conduct violates FACE, RICO, ORICO, and state law, and is not protected by the First Amendment of the United States Constitution. Furthermore, Plaintiffs seek an injunction preventing Defendants from continuing to violate FACE,

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(e) Cause or continue a strike, boycott or other collective action injurious to some person's business, except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act * * *.

6 Section 1962(d) prohibits conspiracies to violate RICO: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

7 Section 166.720(3) makes it "unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."

8 Section 166.720(4) prohibits "any person to conspire or endeavor to violate any of the provisions of subsections (1), (2) or (3) of this section."

ORICO, and any other laws by publishing the Deadly Dozen List and similar posters. In sum, Plaintiffs demand compensatory damages of at least $200 million, punitive damages of at least $300 million, and treble damages of at least $300 million.

In response to Plaintiffs' allegations, Defendants moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, under Rule 12(b)(6) for failure to state a claim, and under Rule 12(c) for judgment on the pleadings. I examine these motions below.

STANDARD

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of establishing jurisdiction. *Farmers Ins. Ex. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). However, "[w]here [as here] a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). That is, plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant. *Id.*

A Rule 12(b)(6) motion to dismiss for failure to state a claim can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995); *Everest and Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). Similarly, a Rule 12(c) motion for "judgment on the pleadings is appropriate when,

even if all allegations in the complaint are true, the moving party is entitled to judgment as a matter of law." *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993) (citing *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990)).

DISCUSSION

Although many of the Defendants filed separate Motions to Dismiss and briefs in support of those motions, most of the arguments address identical issues or adopted analyses in other Defendants' memoranda. Therefore, unless otherwise designated, I consolidate and address the Defendants' contentions together.

Defendants maintain that this Court lacks personal jurisdiction over Defendants and they also attack each of Plaintiffs' seven causes of action. I address each ground for dismissal in turn.

I. Personal Jurisdiction

A. Individual Defendants' Arguments[9]

Defendants contend that this Court may not assert general jurisdiction over them for several reasons: (1) they were not physically served with the Complaint in Oregon; (2) they are not domiciled in Oregon; (3) they do not engage in substantial activities in Oregon; and (4) they did not expressly consent to this Court's exercise of jurisdiction over them. In addition, this Court cannot assert long-arm jurisdiction over Defendants because Plaintiffs' allegations do not sufficiently show that Defendants distributed threatening

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[9] Specifically, Defendants Mears, Dodds, Miller, Treshman, Dreste, Foreman, and Wysong join in this argument. These Defendants reside in the following states, respectively: New Hampshire, Kansas, Wisconsin, Maryland, Missouri, California, and Tennessee.

posters which were used or consumed in Oregon through the ordinary course of trade. Finally, Defendants argue that long-arm jurisdiction would also violate their due process rights because: (1) Defendants have not purposefully availed themselves of the privileges in Oregon; (2) Defendants' activities have not arisen out of forum-related activities; and (3) extension of jurisdiction would be unreasonable.

B. Plaintiffs' Arguments

In opposition, Plaintiffs assert that the Court may properly exercise jurisdiction because, through their activities with ACLA, Defendants are responsible for publication and distribution of the Dirty Dozen List which intentionally targets two Oregon physicians, Drs. James and Elizabeth Newhall, who are Plaintiffs in this action. Because Defendants directed their anti-abortion efforts directly against Oregon residents, they had purposeful contact with Oregon which resulted in the injury that is the subject of this lawsuit.

C. Analysis

Although seven Defendants join in Defendants Mears' and Dodds' argument in support of dismissal for lack of personal jurisdiction, only Defendants Mears, Dodds, Treshman, and Miller raised the defense of lack of personal jurisdiction in their first responsive pleading. Defendants Foreman, Wysong, and Dreste failed to dispute personal jurisdiction in their Answer. "A general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction." *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (citing Fed. R. Civ. P. 12(h)(1)), *cert. denied*, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987). Therefore, Defendants Foreman, Wysong and Dreste waived their right to dispute personal jurisdiction, and I address this argument only with respect to Defendants Mears, Dodds, Miller, and Treshman.

Personal jurisdiction over a non-resident defendant is tested by a two-part analysis: the exercise of jurisdiction must (1) satisfy the requirements of the applicable federal statute governing personal jurisdiction,[10] or if none exists, the

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[10] RICO contains an applicable provision governing service of process, 18 U.S.C. § 1965(b) which provides:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

In federal question cases, a court has personal jurisdiction over non-resident defendants only if they are amenable to service of process and the exercise of jurisdiction comports with due process. *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, 111, 108 S.Ct. 404, 413, 98 L.Ed.2d 415 (1987). Section 1965(b) of RICO allows nationwide service provided that "the court * * * ha[s] personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff * * * show[s] that there is no other district in which a court will have personal jurisdiction over all of the alleged co- conspirators." *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 539 (9th Cir. 1986). Therefore, section 1965(b) permits a district court to exercise jurisdiction over all RICO co-conspirators if the court has personal jurisdiction over only one of the defendants. *See Hawkins v. Upjohn Co.*, 890 F. Supp. 601, 606 (E.D.Tex.1994) (examining whether only one of several RICO co-conspirator defendants was subject to the Texas long-arm statute within the due process limits).

Although § 1965(b) does not completely obviate the need for applying the traditional due process "minimum contacts" analysis with respect to the forum State, plaintiffs need only show that this court could exercise personal jurisdiction, without offending due process, over one of the RICO co-conspirators. Conversely, under the traditional "minimum contacts" analysis, to comport with due process, a defendant must have certain "minimum contacts" with the forum State and "[e]ach defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 788-90, 104 S.Ct. 1482, 1486-87, 79 L.Ed.2d 804 (1984).

long-arm statute of the state in which the district court sits; and (2) comport with principles of federal due process. *Terracom v. Valley Nat. Bank*, 49 F.3d 555, 559 (9th Cir. 1995). Oregon's long-arm statute, ORCP 4, confers jurisdiction to the extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir. 1990) (citing ORCP 4L;[11] *Oregon ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 384, 657 P.2d 211 (1982)). Therefore, because Oregon's long-arm statute is coextensive with the outer limits of federal due process, I need only analyze the second prong of the personal jurisdiction test. *Chan v. Society Expeditions*, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994).

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts * * * such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' [citation omitted]." *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984) (quoting *International Shoe Co. v.*

In the present action, several alleged co-conspirator Defendants reside in Oregon; therefore, under section 1965(b), this Court has nationwide jurisdiction over all other co-conspirator Defendants. Consequently, the traditional "minimum contacts" analysis is not required for Plaintiffs' RICO claims. Nevertheless, I examine personal jurisdiction of the non-resident Defendants with regard to the other federal and state law claims.

[11] Oregon's long-arm statute, ORCP 4, lists several specific instances where the court may exercise personal jurisdiction over a defendant, and then adds in ORCP 4L, "Notwithstanding a failure to satisfy the requirement of sections B through K of this rule, [a court has personal jurisdiction] in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). For a defendant to be subject to general personal jurisdiction, he must have such "continuous and systematic contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Reebok Intern. Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995), *cert. denied*, 516 U.S. 908, 116 S.Ct. 276, 133 L.Ed.2d 197 (1995). However, where, as here, the defendant's contacts with the forum are not continuous and systematic, the forum may exercise only specific personal jurisdiction, which is determined by the following three-part test:

> "(1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Id. (quoting *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1485 (9th Cir. 1993)).

1. Purposeful Availment

"This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." *Burger*

King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citations and internal quotation marks omitted) (merely contracting with a resident of a forum state is insufficient to confer specific jurisdiction over a nonresident). Different standards for purposeful availment apply to tort cases, as compared to contract cases. *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995) (extended specific jurisdiction to nonresident defendants who caused plaintiff to be unlawfully arrested in the forum state). Unlike a contract case (e.g. *Burger King*), in a tort case, "jurisdiction may attach if an out-of-forum defendant merely engages in conduct aimed at, and having effect in, the situs state." *Ziegler*, 64 F.3d at 473 (citing *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991)).

"[T]he three elements of purposeful availment in tort cases are: (1) intentional action; (2) aimed at the forum state; and (3) causing harm that the defendant should have anticipated would be suffered in the forum state." *Ziegler*, 64 F.3d at 474 (citing *Core-Vent* at 1486). The lack of physical contact with the forum does not necessarily defeat jurisdiction. *Calder*, 465 U.S. at 788, 104 S.Ct. at 1486 (personal jurisdiction proper where nonresident's wrongdoing is intentionally directed at a resident); *Ziegler*, 64 F.3d at 474.

In the present action, Plaintiffs assert a claim under state tort law, as well as claims under FACE, RICO, ORICO, which all involve tortious-type conduct. Therefore, in determining whether Defendants purposefully availed themselves of this forum, I apply the analysis for tort cases, set forth in *Ziegler*.

According to Plaintiffs' factual allegations, Defendant ACLA, "acting through and in active concert with each of the other defendants, publicly announced and released into interstate commerce" the Deadly Dozen List which targeted two Oregon Plaintiffs by listing their names and addresses.

Compl. ¶ 40, Ex. A. "Defendants intended for the Deadly Dozen List to instill fear in the doctors specifically named therein * * * [and] have distributed and continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶¶ 41, 43. As Plaintiffs document in their Complaint, lists or posters similar to those distributed by Defendants have resulted in death or injury to other doctors who perform abortions.

These factual allegations show that Defendants targeted two Oregon doctors with the intention to instill fear in the doctors and cause them serious physical and emotional harm. Therefore, the purposeful availment requirements of *Ziegler* are easily met: Defendants' wrongful conduct was aimed directly at two Oregon doctors who Defendants knew were in Oregon and who Defendants clearly anticipated and hoped would suffer the intended harm. Consequently, I find that all Defendants purposefully availed themselves of Oregon law.

2. Arising Out Of

The claims arise out of a defendant's forum-related activities if plaintiff would not have a cause of action "but for" defendant's contacts with the forum. *Ziegler*, 64 F.3d at 474. The "but for" test should not be narrowly applied; rather, the requirement is merely designed to confirm that there is some nexus between the cause of action and defendant's contact with the forum. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). As in *Ziegler*, there is no dispute in this case that "but for" the contacts between Defendants and Oregon, the Oregon Plaintiffs would not have suffered the injury which is the subject of this lawsuit against Defendants. *Ziegler* 64 F.3d at

474. Therefore, Plaintiffs' alleged injuries arise out of Defendants' contact with Oregon.

3. Reasonableness of Exercising Jurisdiction

In determining whether exercise of jurisdiction is reasonable, the court must weigh all of the following seven factors:

> (1) the extent of the defendant's purposeful injection [sic] into the forum;
>
> (2) the defendant's burdens from litigating in the forum;
>
> (3) the extent of conflict with the sovereignty of the defendant's state;
>
> (4) the forum state's interest in adjudicating the dispute;
>
> (5) the most efficient judicial resolution of the controversy;
>
> (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
>
> (7) the existence of an alternative forum.

Ziegler, 64 F.3d at 475 (citing *Terracom v. Valley Nat. Bank*, 49 F.3d 555, 561 (9th Cir. 1995)). No single factor is dispositive. *Terracom* at 561 (citing *Core-Vent*, 11 F.3d at 1488). I address each factor in turn.

a. Purposeful Interjection

"[T]he extent of interjection is to be considered: 'Even if there is sufficient interjection into the state to satisfy the [purposeful availment prong], the degree of interjection is

a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong]." *Core-Vent*, 11 F.3d at 1488 (quoting *Insurance Company of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981) (internal quotation marks omitted)). Like *Ziegler*, where Florida defendants caused a California plaintiff to be arrested in California, in this case, Defendants significantly interjected into Oregon by publishing and nationally distributing threats directed at two Oregon Plaintiffs. The harmful effects in Oregon caused by Defendants' actions were not merely incidental; rather, Defendants intentionally directed their actions towards Oregon so that the Oregon Plaintiffs would be physically and emotionally injured. *See Ziegler*, 64 F.3d at 475 ("[defendants] intentionally directed their actions towards California, for the purpose of having [plaintiff] arrested there and extradited. Their purposeful injection [sic] into California was significant."). Consequently, Defendants' significant interjection into Oregon, for the purpose of injuring the Oregon Plaintiffs, weighs in favor of exercising jurisdiction here.

b. Burden on Defense

The second factor concerns Defendants' burden in litigating this case in Oregon. Unlike other cases involving nonresident defendants, the four Defendants in this case who challenge personal jurisdiction in Oregon are each from a different State: New Hampshire, Kansas, Wisconsin, and Maryland. As a collective group, no one State is less burdensome than another for the Defendants. However, for each individual Defendant, their resident State is obviously less burdensome than Oregon because none of the Defendants have significant physical contacts with Oregon. Accordingly, the burden on each Defendant in litigating in Oregon tips slightly in Defendants' favor.

c. Conflict with Nonresident State's Sovereignty

Although Defendants' States may have an interest in protecting their residents' rights under the First Amendment to the United States Constitution, their States have little interest in resolving claims which involve unprotected tortious conduct of their residents, as alleged by Plaintiffs. Therefore, interference with the sovereignty of the nonresident States is minimal and this third factor favors jurisdiction.

d. Forum State's Interest

Like other States, Oregon maintains a strong interest in providing an effective means of redress for its residents who are tortiously injured. *See Core-Vent*, 11 F.3d at 1489 (noting that California maintains a strong interest in providing redress to its residents who are tortiously injured). Therefore, this fourth factor also supports exercising personal jurisdiction.

e. Efficiency

Similarly, the fifth factor also weighs in favor of exercising jurisdiction in Oregon because Oregon contains more parties to this lawsuit than any other State. In evaluating this factor, the Ninth Circuit instructs that the court should look "'primarily at where the witnesses and the evidence are likely to be located.'" *Ziegler*, 64 F.3d at 475-76 (quoting *Core-Vent*, 11 F.3d at 1489). Because the parties will be witnesses in this action, Oregon contains a larger number of witnesses than any other single State. Although the four Defendants who oppose jurisdiction do not reside in Oregon, the following co- defendants are physically present in Oregon: ACLA, ALM, Burnett, Ramey, and Stover. Furthermore, five of the Plaintiffs are also located in Oregon: Planned Parenthood, Portland Feminist, Elizabeth Newhall,

James Newhall, and Karen Sweigert. Therefore, Oregon is the most efficient forum for resolution of this matter.[12]

f. Importance of Forum to Plaintiffs

Obviously, Plaintiffs would prefer to litigate in Oregon, but "mere preference on the part of the plaintiff for its home forum does not affect the balancing * * *." *Core-Vent*, 11 F.3d at 1490. Plaintiffs have not suggested that they cannot obtain identical relief in other States. However, the overwhelming majority of parties are physically present in Oregon; thus, it would be foolish to require Plaintiffs to seek redress in some other State where personal jurisdiction as to other Defendants may be lacking. This factor neither adds nor detracts from the reasons for exercising jurisdiction in Oregon.

g. Unavailability of Alternative Forum

As with the sixth factor above, Plaintiffs do not argue that no other forum exists. "'Plaintiff bears the burden of proving the unavailability of an alternative forum.'" *Ziegler*, 64 F.3d at 476 (quoting *Core-Vent*, 11 F.3d at 1490). Clearly, Plaintiffs could sue in another State. However, Plaintiffs' failure to satisfy this factor has little effect on the determination to exercise jurisdiction in this case.

h. Balancing Factors

In sum, factors 1 (purposeful interjection), 3 (non-forum States' sovereignty), 4 (Oregon's interest), and

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[12] The Court is mindful that this factor has recently been discounted because "'[m]odern advances in communications and transportation have significantly reduced the burden of litigating [out-of-state].'" *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995) (quoting *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199 (9th Cir. 1988)).

5 (efficiency), favor the Plaintiffs. At best, factors 2 (burden on Defendants), 6 (importance of forum to Plaintiffs), and 7 (alternative forum), tip in favor of Defendants. However, Defendants' purposeful interjection, Oregon's interest in providing redress to its residents, and efficiency, decisively tip the balance in Plaintiffs' favor towards exercising jurisdiction.

"Once purposeful availment has been established, the forum's exercise of jurisdiction is *presumptively reasonable*. To rebut that presumption, a defendant must present a *compelling* case that the exercise of jurisdiction would, in fact, be unreasonable." *Ziegler*, 64 F.3d at 476 (quoting *Roth v. Garcia Marquez*, 942 F.2d at 625 (internal quotation marks omitted; emphasis in original)). Because the balance of factors strongly favors Plaintiffs, Defendants cannot overcome the presumption that exercising jurisdiction would be reasonable. Consequently, this Court has specific personal jurisdiction over the non-resident Defendants who timely challenged jurisdiction: Mears, Dodds, Treshman, and Miller. Likewise, this Court has personal jurisdiction over all other Defendants because they either reside or are principally located in Oregon, or they waived their right to object to personal jurisdiction under Fed. R. Civ. P. 12(h)(1).

II. Prohibition Of Speech Protected By The First Amendment

A. Defendants' Arguments

Addressing the merits of Plaintiffs' claims, Defendants contend that Plaintiffs impermissibly seek to prohibit speech protected by the First Amendment. Defendants' anti-abortion protests are speech and may not be proscribed merely because they are offensive and intimidating to Plaintiffs. Furthermore, Defendants' oral statements and posters do not fall within the "fighting words" exception to protected speech because that expression does not incite

imminent lawless action which is likely to occur. In fact, Plaintiffs failed to alleged that their anti-abortion expressions either incite imminent violence or are likely to produce the violence. Therefore, based upon the undisputed allegations in the Complaint, Defendants' expressions are not "fighting words" and must be protected.

B. Plaintiffs' Arguments

Contrary to Defendants' characterization of Plaintiffs' theory, Plaintiffs do not contend that Defendants' expression must incite imminent violence to be forbidden. Instead, they argue that Defendants' actions constitute "true threats" which are prohibited by FACE and not protected by the First Amendment. Although Defendants' expression does not expressly threaten Plaintiffs, they assert that the expression becomes a "true threat" when placed in context. Therefore, by alleging the context surrounding Defendants' expression and its effect upon Plaintiffs, Plaintiffs have alleged sufficient facts to support the conclusion that Defendants' expression constitutes "true threats" which are not protected speech under the First Amendment.

C. Analysis

Plaintiffs seek to prohibit Defendants' conduct under FACE, 18 U.S.C. § 248, which regulates three types of activities: (1) the use of "force," (2) "threat[s] of force," and (3) "physical obstruction." 18 U.S.C. § 248(a). Only the second proscribed activity, "threats of force," constitutes expressive conduct eligible for protection under the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484-85, 113 S.Ct. 2194, 2198-99, 124 L.Ed.2d 436 (1993) ("[a] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"). Furthermore, FACE only forbids "threats of force" that "intimidate" which is defined as to "place a person in reasonable apprehension of bodily harm" *Id.* § 248(e)(3).

"True threats" are not protected by the First Amendment. *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (upholding statute that criminalized threats of violence against the president but concluding that the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," was political hyperbole and not a "true threat" given its context); *see also R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 2546, 120 L.Ed.2d 305 (1992) ("threats of violence are outside the First Amendment"); *Melugin v. Hames*, 38 F.3d 1478, 1484-86 (9th Cir. 1994) (upholding constitutionality of statute, as interpreted by the Alaska Court of Appeals, which criminalized threats of death or physical injury). However, statutes which punish "a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." *Watts*, 394 U.S. at 707, 89 S.Ct. at 1401. Therefore, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* Consequently, to the extent Plaintiffs seek to prohibit "true threats" under FACE, the First Amendment is not violated.[13] The issue then is determining whether Defendants' expressive conduct constitutes a "true threat."

The Ninth Circuit recently restated the objective test used to resolve the issue of whether a threat is a true threat:

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[13] Contrary to Defendants' assertions, Plaintiffs are not pursuing an incitement to violence theory, see *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1968) (expression which likely incites others to imminent violence is unprotected under the First Amendment), but rather allege that Defendants intended to harm specific Plaintiffs, as evidenced by Defendants' threats. *See United States v. Dinwiddie*, 76 F.3d 913, 922 n.5 (8th Cir. 1996) ("The *Brandenburg* test applies to laws that forbid inciting someone to use violence against a third party. It does not apply to statutes, like FACE, that prohibit someone from directly threatening another person"), petition for cert. filed, (U.S. Aug. 6, 1996) (No. 96-5615).

> "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990). Furthermore, "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990) and *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987)); *accord United States v. Kelner*, 534 F.2d 1020 (2d Cir.) ("So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."), *cert. denied*, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976).

Lovell v. Poway Unified School District, 90 F.3d 367, 372 (9th Cir. 1996). Under this test, the plaintiff need not prove that the defendant had the ability or actually intended to physically harm the plaintiff. *Melugin*, 38 F.3d at 1485. "Moreover, the issue whether the [plaintiff] has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Id.* (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)).

In *Lovell*, a student told a school counselor, "If you don't give me this schedule change, I'm going to shoot you!" *Lovell*, 90 F.3d at 369. The counselor informed the school about the student's statement; in response, the school suspended the student. *Id.* The student's parents filed suit on

behalf of the student, claiming, in part, that the suspension violated the student's First Amendment rights by punishing her speech. *Id.* at 370. The Ninth Circuit concluded that the suspension did not violate the student's First Amendment rights because threats of violence are not protected speech and "[a] reasonable person in these circumstances would have foreseen that [the counselor] would interpret that statement as a serious expression of intent to harm." *Id.* at 372. Thus, a true threat exists if the target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others to act at a level less than incitement — it is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.

Unlike in *Lovell*, the alleged threats in this case are not so easily identified in the Complaint. Nevertheless, federal notice pleading standards are not strict and motions to dismiss are not granted "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claims which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Plaintiffs allege that "Defendants have distributed and continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶ 43, Ex. A. Furthermore, "[b]y creating and circulating [a poster targeting Plaintiff Crist], the defendants intend to place Dr. Crist * * * in reasonable fear of bodily harm should he continue to perform abortions * * *." *Id.* ¶ 48, Ex. B. Viewing the Deadly Dozen List and the Crist poster in the factual context of previous "unwanted"-style posters which listed names of other doctors who were subsequently assaulted or murdered, I cannot conclude as a matter of law that a reasonable person in these circumstances would not foresee that the Plaintiffs would interpret the Deadly Dozen List and Crist poster as serious expressions of intent to harm. *See Lovell*, 90 F.3d at 372-73 ("Alleged threats should be

considered in light of their entire factual context, including the surrounding events and the reaction of the listeners. * * * Given the level of violence in public schools today, it is no wonder that [the counselor] felt threatened. * * * [Nevertheless,] the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect." (internal quotation marks omitted)). Therefore, Defendants have not shown that Plaintiffs can prove no set of facts in support of their claim because Defendants' speech may be unprotected "true threats."[14]

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[14] Defendants raised several new arguments in their Reply Brief, to which Plaintiffs have not been given an opportunity to respond. Defendants contend that (1) their expressions are not express threats and the context cannot convert the expressions into threats, (2) Defendants' expressions were public threats which must be likely to cause imminent lawless action to be actionable, and (3) the court, not a jury, determines whether a "true threat" exists.

First, although the Deadly Dozen List and the Crist poster made their alleged threats implicitly, instead of expressly stating, "We're going to kill you!," the threats are no less fearsome when couched in the context of the effect of previous posters, as well as statements by Defendants like Defendant McMillian who said, shortly after the murder of two doctors who were listed on posters, "In my opinion a sure way for the abortionists to be safe would be to have a cease-fire--the abortionists stop killing babies, then anti-abortionists would stop shooting abortionists." Compl. ¶ 69. Nothing in the objective test for "true threats" suggests that the threat of violence must be express. *See Lovell*, 90 F.3d at 372; *see also United States v. Gilbert*, 884 F.2d 454, 455-57 (9th Cir. 1989) (examining what a letter and enclosed poster implied to determine whether they constituted an unprotected threat), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990).

Second, the fact that the threats were publicly announced instead of privately stated does not affect the test for determining whether the threat is a "true threat." For instance, it would be absurd if a plaintiff would have to satisfy the stringent standard of imminent lawless action where the speaker threatens the plaintiff using a public television broadcast, but only have to show that a reasonable person

However, the Court agrees with the observation by the American Civil Liberties Union ("ACLU"), as *amicus curiae*, that Plaintiffs do not clearly separate the expression that constitutes a "true threat" from the context of the expression.[15] In addition, Plaintiffs do not clearly identify the individual Defendants who are responsible for the threats. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 102 S.Ct. 3409, 3429, 73 L.Ed.2d 1215 (1982). Therefore, Plaintiffs are given leave to amend their Complaint in order to clearly distinguish between the allegedly actionable and the contextual expressions, as well as specifically name the individual Defendants who intended to further the alleged threats of violence.[16]

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would foresee that the recipient would interpret the threat as a serious expression of an intent to harm where the speaker threatens the plaintiff in a private letter.

Third, as stated earlier in this Opinion, contrary to Defendants' assertions, the jury determines whether a threat constitutes a "true threat." *See Melugin*, 38 F.3d at 1485 (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990), *cert. denied*, 498 U.S. 986, 111 S.Ct. 522, 112 L.Ed.2d 533 (1990)).

[15] In ruling on this motion, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context.

[16] Furthermore, Plaintiffs should be aware that there are serious questions concerning each Plaintiff's standing to assert the causes of action in the Complaint. I decline to resolve the issue at this juncture because Defendants have not raised it, but standing should be addressed by the parties as soon as possible. *See National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255, 114

III. Constitutionality Of FACE

A. Defendants' Arguments

Defendants argue that FACE violates the Commerce Clause because it regulates activity which is not sufficiently connected to interstate commerce. Second, the Fourteenth Amendment does not authorize Congress to regulate solely private conduct through FACE. Third, Defendants contend that FACE is facially unconstitutional under the First Amendment for several reasons: (1) the statute impermissibly bans speech based on its anti-abortion viewpoint; (2) FACE imposes a content-based restriction by regulating speech based upon whether it intimidates the listener; and (3) FACE is unconstitutionally vague and overbroad because it fails to define key terms and regulates speech that does not fall within the categories of "fighting words" or "imminent threats of lawless action."

B. Plaintiffs' Arguments

Plaintiffs respond by arguing first that Congress rationally concluded that the conduct regulated by FACE (*e.g.*, violence, threats of violence, and physical obstructions aimed at persons who provide abortions) affects interstate commerce. Furthermore, Congress crafted FACE so that it was reasonably tailored to regulate such conduct. Therefore, Congress properly regulates such conduct under the Commerce Clause.

Second, Plaintiffs reject Defendants' suggestion that FACE must regulate state action, in order to be valid under the Fourteenth Amendment. The relevant inquiry is whether

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S.Ct. 798, 802, 127 L.Ed.2d 99 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation").

Congress possessed authority under the Constitution for enacting FACE, not whether Congress seeks to regulate state action.

Third, Plaintiffs maintain that FACE passes constitutional muster under the First Amendment because it is viewpoint and content neutral. In addition, FACE is not constitutionally overbroad because it regulates only unprotected expression. Moreover, the statute is also not unconstitutionally vague because it clearly defines the prohibited activity.

C. Analysis

In relevant part, FACE enables persons who provide or seek reproductive services to recover civil remedies against anyone who:

> [B]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * *.

18 U.S.C.A. § 248. Defendants' constitutional attacks of this statute are addressed individually below.

1. Commerce Clause

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce [citation omitted], *i.e.*, those activities

that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, ---- - ----, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995) (struck down the Gun-Free School Zones Act of 1990 which criminalized possession of firearms in school zones because the statute failed to regulate activity that substantially affects interstate commerce) (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27, 88 S.Ct. 2017, 2024 n.27, 20 L.Ed.2d 1020 (1968)). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630. "'Even activity that is purely intra-state in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 277, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981) (holding that the Surface Mining Control and Reclamation Act of 1977, which mandates compliance with environmental standards, did not contravene the Commerce Clause) (quoting *Fry v. United States*, 421 U.S. 542, 546, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975)).

In determining whether a particular exercise of congressional power is valid under the Commerce Clause, "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360. "This established, the only remaining question for the judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964)) (concluding that Congress had authority under the Commerce Clause to enact the Civil Rights Act of 1964 because restaurants that discriminated served fewer customers, and therefore suppressed interstate commerce).

In the present action, Congress made the following findings when it enacted FACE:

> (1) An interstate campaign of violent, threatening, obstructive and destructive conduct aimed at providers of reproductive health services across the nation has injured providers of such services and their patients, and the extent and interstate nature of this conduct place it beyond the ability of any single state or local jurisdiction to control;
>
> (2) Such conduct, which has included blockades and invasions of medical facilities, arson and other destruction of property, assaults, death threats, attempted murder and murder, infringes upon the exercise of rights secured by federal and state law, both statutory and constitutional;
>
> (3) Such conduct also burdens interstate commerce by forcing patients to travel from states where their access to reproductive health services is obstructed to other states, and by interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states * * *.

H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994), *reprinted* in 1994 U.S.C.C.A.N. 699, 724; *see also* H.R. Rep. No. 306, at 6-10 (1993) *reprinted* in 1994 U.S.C.C.A.N. 699, 703-707 (explaining the need for federal remedies to protect patients and providers of reproductive health services); *see also* S. Rep. No. 117, at 31-32 (1993).

Based upon its extensive findings, Congress rationally concluded that violence, threats of force, and physical obstructions directed at persons seeking or providing reproductive health services substantially affect interstate commerce. Furthermore, all circuits which have addressed the issue agree that Congress rationally concluded that the activity regulated by FACE substantially affects interstate commerce. *See United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); *United States v. Dinwiddie*, 76 F.3d 913, 920-21 (8th Cir. 1996), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); *United States v. Wilson*, 73 F.3d 675, 680-83 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3669 (Mar. 20, 1996) (No. 95-1523); *Cheffer v. Reno*, 55 F.3d 1517, 1519-21 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995), *cert. denied*, 516 U.S. 809, 116 S.Ct. 55, 133 L.Ed.2d 19 (1995). I agree with the Fourth Circuit in *Reno*, which concluded that "Congress also chose regulatory means reasonably adapted to permissible ends [because] [t]he Act's criminal and civil penalties are designed to deter violent, obstructive and destructive conduct." 47 F.3d at 647 (listing the Act's permissible ends). Therefore, in accord with all circuit courts that have examined whether Congress permissibly invoked its commerce power to enact FACE, I conclude that FACE is a constitutional exercise of Congress' power under the Commerce Clause.[17]

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[17] In so holding, I reject Defendants' argument that a different result is compelled by *Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995), for two reasons: (1) unlike the extensive congressional findings which accompanied FACE, in *Lopez*, Congress made no findings which explained how the statute regulated activity affecting interstate commerce; and (2) unlike FACE's regulation of commercial activity with regard to the provision of health services, the statute in *Lopez* did not regulate any commercial activity. *See Dinwiddie*, 76 F.3d at 921; *Wilson*, 73 F.3d at 683-84; *Cheffer*, 55 F.3d at 1520.

2. First Amendment

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech * * *." "The First Amendment generally prevents government from proscribing speech, *see, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 309-311 [60 S.Ct. 900, 905-06, 84 L.Ed. 1213] (1940), or even expressive conduct, *see, e.g., Texas v. Johnson*, 491 U.S. 397, 406 [109 S.Ct. 2533, 2540-41, 105 L.Ed.2d 342] (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid" *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). Furthermore, "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 391 [112 S.Ct. 2538, 2547-48, 120 L.Ed.2d 305] (1992). Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger, et al., v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, ----, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)).

Regulations which "suppress, disadvantage, or impose differential burdens upon speech because of its content" are valid under the First Amendment only if they survive strict scrutiny, *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, ----, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994),

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Because I hold that FACE is within Congress' commerce authority, I need not consider Defendants' argument that Congress does not have authority under the Fourteenth Amendment to enact FACE.

which requires Congress to "show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). However, where the regulation is content-neutral, it need only satisfy "an intermediate level of scrutiny," *Turner*, 512 U.S. at ----, 114 S.Ct. at 2459, which upholds the regulation if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *see also Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (applying intermediate level of scrutiny to time, place, and manner restrictions on speech). Therefore, I must first determine whether FACE is content and viewpoint neutral, and then apply the proper level of scrutiny under the First Amendment.

a. Content- and Viewpoint-Based

Several circuits have addressed the issue of whether FACE is content- and viewpoint-based, and I concur in their well-reasoned conclusions. *See Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996); *American Life League*, 47 F.3d 642, 651 (4th Cir. 1995); *Cheffer*, 55 F.3d 1517, 1521 (11th Cir. 1995) (expressly adopting rationale set forth in *American Life League*). However, I offer a brief analysis in addition to the Eighth, Fourth, and Eleventh Circuits' discussions.

As discussed earlier in Part II.C. of this Opinion, FACE regulates the use of force, threats of force, and physical obstruction, which are activities that are not protected under the First Amendment. The fact that application of FACE is based upon whether the victim of a threat of violence is placed in "reasonable apprehension of bodily harm," does not

cause the statute to become content-based, like the ordinance in *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992),[18] because threats of violence are not protected under the First Amendment. *See Dinwiddie*, 76 F.3d at 922.

Furthermore, FACE is not viewpoint-based merely because its application is limited to force, threats of force, or physical obstruction against a person because that person obtains or provides reproductive health services. Congress may "single[ ] out" specific types of conduct "because this conduct is thought to inflict greater individual or societal harm," *Mitchell*, 508 U.S. at 487-88, 113 S.Ct. at 2201 (upholding statute that enhances sentences for crimes motivated by racial bias), so long as no distinction is made based upon the expressive content or viewpoint of the conduct, *see R.A.V.*, 505 U.S. 377, 391-94, 112 S.Ct. 2538, 2547-49 (striking down ordinance that regulated certain types of "fighting words" which insulted or provoked violence "on the basis of race, color, creed, religion or gender" because the ordinance distinguished application based on the content and viewpoint of the "fighting words").

Unlike the ordinance in *R.A.V.*, FACE is not viewpoint-based because it prohibits all conduct regardless of the violator's viewpoint so long as that conduct is directed towards a person merely because that person obtains or

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[18] In *Forsyth*, the Supreme Court struck down an ordinance which calculated permit fees for parades based on the cost of security for parade participants which varied depending on the listeners' reaction to the speech. 505 U.S. at 134-36, 112 S.Ct. at 2403-05. The Court noted that the administrator, in assessing the cost of the permit, would necessarily have to examine the contents of the message conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response. *Id.* at 134, 112 S.Ct. at 2403. However, *Forsyth*, unlike the present action, involved speech protected under the First Amendment.

provides reproductive health services. *See R.A.V.*, 505 U.S. at 390, 112 S.Ct. at 2546-47 ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); *see also Dinwiddie*, 76 F.3d at 923; *American Life League*, 47 F.3d at 650-51.[19] The mere fact that a class of persons with a particular viewpoint are more likely to violate the statute does not render the law a viewpoint-based regulation of speech. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, ----, 114 S.Ct. 2516, 2524, 129 L.Ed.2d 593 (1994) ("That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order" which established a 36-foot buffer zone from which demonstrators were prohibited); *see, e.g., O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War).

Consequently, like the Eighth, Fourth, and Eleventh Circuits, I conclude that FACE is a content-neutral and viewpoint-neutral regulation. Therefore, I apply an intermediate level of scrutiny to determine whether the

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[19] Moreover, FACE's proscription of conduct directed at persons *because* they obtain or provide reproductive medical services is not content- or viewpoint-based because statutes may proscribe conduct based upon the motive of the violator without impermissibly regulating the content of the expression. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984) (upholding Title VII which makes it unlawful for an employer to discriminate against an employee "*because* of such an individual's race, color, religion, sex, or national origin." (quoting 42 U.S.C. § 2000e-2(a)(1) (emphasis added)).

statute's incidental burdens on protected speech violate the First Amendment.[20]

b. Intermediate Scrutiny Under *O'Brien*

A statute survives intermediate scrutiny if (1) it is content-neutral, (2) it furthers an important or substantial governmental interest, and (3) the restriction is narrowly tailored to further that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner*, 512 U.S. 622, ----, 114 S.Ct. 2445, 2469. "Rather, the requirement of narrow tailoring is satisfied so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)) (internal quotation marks omitted).

FACE furthers the government's "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," *Madsen*, 512 U.S. at ----, 114 S.Ct. at 2526 (citing *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)), as well as the government's interest in "protecting patients and

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[20] Arguably, if FACE only regulates unprotected speech in a content- and viewpoint-neutral manner, I need not even apply the intermediate level of scrutiny to FACE. *Melugin*, 38 F.3d at 1483-84 (statutes which regulate unprotected expression need only be "rationally related to a legitimate state interest"). However, because FACE's regulation of unprotected conduct "'incidentally affect[s] some conduct with protected expressive elements, such as peaceful but obstructive picketing,'" *Dinwiddie*, 76 F.3d at 923 (quoting *American Life League*, 47 F.3d at 648), I must consider whether these burdens on protected speech violate the First Amendment under intermediate scrutiny.

staff from violence and harm and protecting reproductive health facilities from physical destruction or damage." *American Life League*, 47 F.3d at 651. These interests are substantial and support any incidental burdens on protected speech caused by FACE, so long as the burdens are no greater than necessary to further the government's interests. FACE regulates only force, threats of force, and physical obstruction; thus, it "'leaves open ample alternative means for communication,'" and is narrowly tailored to further the government's interests. *Dinwiddie*, 76 F.3d at 923 (quoting *American Life League*, 47 F.3d at 652) ("In a non-violent, non-obstructive manner, protestors may still stand and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills, symbolic gestures and other expressive means").

In sum, I conclude, as did the Eighth, Fourth, and Eleventh Circuits, that FACE serves substantial government interests in preventing violence and preserving access to reproductive health services, and is narrowly tailored to further those interests, without targeting the content of the expression. *See Dinwiddie*, 76 F.3d at 924; *American Life League*, 47 F.3d at 652; *Cheffer*, 55 F.3d at 1521-22.

c. Vagueness and Overbreadth

In addition, I reject Defendants' argument that FACE is unconstitutionally vague because terms like "obstruction," "interference," and "threat of force" are unclear, and "intimidate" is based upon the subjective reaction of third parties. "A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited." *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). Therefore, the statute must "be sufficiently clear so as not to cause persons 'of common intelligence * * * necessarily [to] guess at its meaning and [to] differ as to its application [.]'" *Id.* (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)).

In the present action, all the challenged terms, except for "threat of force," are defined by the statute. For instance, FACE defines "intimidate" as to "place a person in reasonable apprehension of bodily harm to him- or herself or to another," "interfere with" as to "restrict a person's freedom of movement," and "physical obstruction" as "rendering impassable ingress to or egress from a facility that provides reproductive health services * * *." 18 U.S.C. § 248(e)(2), (3), and (4). These specific and clear definitions, by themselves, are sufficient to defeat Defendants' vagueness challenge. Nonetheless, further support for this conclusion is found in *United States v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987), where the Ninth Circuit held that the terms "threat of force," "intimidate," and "interfere with," as used in the Fair Housing Act, 42 U.S.C. § 3631 (1982) (prohibits anyone who "by force or threat of force * * * intimidates or interferes with * * * any person because of his race, color, religion, sex, or national origin * * *") are not unconstitutionally vague.[21] 813 F.2d at 1530. In so holding, the court emphasized that "legislation which proscribes the use of force or the threat of force should not be found to be void for vagueness." *Id.* I see no reason for a different result in this case; FACE is not unconstitutionally vague. *See Dinwiddie*, 76 F.3d at 924; *Cheffer*, 55 F.3d at 1521-22, *American Life League*, 47 F.3d at 653.

Likewise, I also reject Defendants' contention that FACE is unconstitutionally overbroad because it regulates speech that does not fall within two of the categories of

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[21] Likewise, in *Cameron v. Johnson*, the Supreme Court rejected a vagueness challenge to an anti-picketing ordinance which included the terms "interfere with" and "obstruct." 390 U.S. 611, 612 n.1, 616, 88 S.Ct. 1335, 1336 n.1, 1338, 20 L.Ed.2d 182 (1968) (ordinance prohibited "picketing * * * in such a manner as to *obstruct* or unreasonably *interfere with* free ingress or egress to and from any * * * county * * * courthouses * * *.") (Emphasis added).

exclusion from First Amendment protection: "fighting words" or "imminent threats of lawless action." As discussed earlier in Part II.C. of this Opinion, Plaintiffs do not claim that Defendants' actions constitute "fighting words" or an "incitement to imminent violence," but rather allege that Defendants are directing threats of violence at Plaintiffs. Therefore, the analyses under the "fighting words" and "incitement to imminent violence" doctrines do not apply here. Moreover, because true threats of violence are similarly not protected, I must reject Defendants' argument that FACE is overbroad.

Accordingly, I reject Defendants' vagueness and overbreadth arguments and hold that FACE does not violate the First Amendment. Furthermore, I also conclude that Plaintiffs have alleged sufficient facts to state a claim that Defendants' "unwanted"-style posters constitute "threats of violence" under FACE and overcome Defendants' Motion to Dismiss, pursuant to FRCP 12(b)(6).

However, although Plaintiffs succeed at this point in the litigation, there are several troubling issues with regard to their FACE claim that Plaintiffs may need to address in order to survive a motion for summary judgment: (1) whether all Plaintiffs have standing to assert a claim under FACE, (2) which specific conduct by Defendants constitutes "true threats," and (3) whether sufficient evidence warrants submitting to the jury the issue of whether Defendants' alleged conduct constitutes "true threats." At this early stage of the case, accepting all of Plaintiffs' factual allegations as true, I cannot say as matter of law that Plaintiffs have not stated a claim under FACE, but I harbor significant doubts as to whether Plaintiffs will possess sufficient evidence to create a material issue of fact for trial.

IV. RICO

To state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff must show that the conduct of an enterprise, through a pattern of racketeering activity, injured plaintiff's business or property. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). A "pattern" of racketeering activity does not exist unless there is evidence of at least two predicate acts. *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1152 (9th Cir. 1992). "Racketeering activity" is any act indictable under several provisions of Title 18 of the United States Code. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (citing 18 U.S.C. § 1961(1)) (listing the offenses).

Defendants attack Plaintiffs' RICO and ORICO claims on several grounds.[22] I address each of Defendants' contentions in turn.

A. Pleading Standard for RICO Claims

1. Arguments

First, Defendants argue that Plaintiffs failed to satisfy the heightened pleading standard mandated by Fed. R. Civ. P. 9(b)[23] for RICO claims by not pleading with particularity

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[22] Note that the arguments pertaining to RICO are equally applicable to ORICO because the statutes are interpreted consistently. *Pincetich v. Jeanfreau*, 699 F. Supp. 1469, 1475 (D. Or. 1988); *Ius v. Butcher*, 680 F. Supp. 343, 346 n.1 (D. Or. 1987); *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F. Supp. 92, 99 (D. Or. 1985); *Ahern v. Gaussoin*, 611 F. Supp. 1465, 1494 (D. Or. 1985).

[23] Rule 9(b) states in relevant part, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

RICO "predicate acts" (*i.e.*, violations of federal and state criminal law) allegedly committed by Defendants.

In opposition to Defendants' Motion to Dismiss, Plaintiffs contend that they pleaded Defendants' "predicate acts" with sufficient particularity by alleging that Defendants' threats of violence in furtherance of a plan to commit extortion and/or coercion violated the Hobbs Act, 18 U.S.C. § 1951, and Oregon's coercion statute, ORS 163.275.

2. Analysis

Allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b). Likewise, RICO claims based upon predicate acts involving fraud must be pleaded with particularity under Rule 9(b). *See Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (applying Rule 9(b) to allegations of mail fraud as RICO predicate acts), *cert. denied*, 502 U.S. 1094, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (applying Rule 9(b) to allegations of mail and wire fraud as RICO predicate acts), *cert. denied*, 493 U.S. 858, 110 S.Ct. 168, 107 L.Ed.2d 124 (1989); *Sun Sav. and Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987).

However, as in this case, where the alleged RICO predicate acts do not involve fraud, the more lenient pleading standard in Rule 8(a) applies.[24] *See McLaughlin v. Anderson*,

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[24] Rule 8(a) requires:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain
>
> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it;

962 F.2d 187, 194 (2nd Cir. 1992) (distinguishing pleading standard for RICO claims involving fraud as compared to extortion, and holding that district court erred in applying Rule 9(b) to plaintiff's extortion claim: "the district court should have evaluated the [extortion] claim against the more lenient pleading standards of [Rule] 8(a)."); *Rose v. Bartle*, 871 F.2d 331, 356 n.33 (3rd Cir. 1989) ("It should be noted that the plaintiffs allege no mail, wire or other fraud by the defendants, and therefore are not required to adhere to the higher pleading standard of 'particularity' mandated by Fed. R. Civ. P. 9(b)"); *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 776 (7th Cir. 1994) (unless the RICO claim involves fraud, it must conform only to the standards set out in Rule 8). Because Plaintiffs allege RICO predicate acts involving extortion under 18 U.S.C. § 1951 (the Hobbs Act) and coercion under ORS 163.275 (Oregon Coercion Statute), rather than fraud, their RICO claims need not be pleaded with particularity under Rule 9(b).[25]

Under the liberal federal notice pleading standards under Rule 8, Plaintiffs need only provide "fair notice" of the claim being asserted and the "grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 45-46, 48, 78 S.Ct. 99, 101-02, 103, 2 L.Ed.2d 80 (1955). With regard to the RICO

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(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and

(3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

[25] Defendants cite *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F. Supp. 92 (D. Or. 1985), for the proposition that all RICO claims must be pleaded with particularity because "'RICO's *in terrorem* effect is potent, in that a RICO defendant faces the unsavory label 'racketeer' as well as the risk of treble damages.'" Miller and Treshman Mem. Supp. Mot. Dismiss at 24 (quoting Schnitzer, 633 F. Supp. at 97). However, that case is inapplicable to the present action because the predicate acts in Schnitzer were wire and mail fraud, 633 F. Supp. at 96, whereas the predicate acts here are extortion and coercion.

predicate acts of extortion and coercion, Plaintiffs have easily satisfied this liberal standard by alleging that Defendants violated 18 U.S.C. § 1951 and ORS 163.275 through issuing and disseminating the Deadly Dozen List, as well as other "unwanted"-style posters and publications which contain threats of force against Plaintiffs in order to induce fear in Plaintiffs and "thus to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶¶ 96-97. These allegations provide sufficient notice to Defendants of the predicate acts of extortion and coercion underlying Plaintiffs' RICO claims.

B. Predicate Acts: Hobbs Act and Oregon Coercion Statute

1. Arguments

Second, Defendants contend that Plaintiffs' RICO claims fail because the predicate act allegations under the Hobbs Act and the Oregon Coercion Statute are flawed for the following reasons: (1) Plaintiffs' do not state an extortion claim under the Hobbs Act because they fail to allege that Defendants unlawfully obtained Plaintiffs' property, and (2) the Oregon Coercion Statute, ORS 163.275, cannot be the basis for a RICO predicate act because ORS 163.275 is unconstitutionally overbroad.

In response, Plaintiffs maintain that they have presented a Hobbs Act extortion claim by alleging that Defendants prevented them from making business decisions free from threats. Furthermore, Plaintiffs properly rely on the Oregon Coercion Statute because the Oregon legislature corrected any overbreadth concerns in the statute after the Oregon Supreme Court declared it unconstitutional.

2. Analysis

a. Hobbs Act

"'The elements of a Hobbs Act violation are [1] extortion and [2] a nexus with interstate commerce.'" *United States v. Hoelker*, 765 F.2d 1422, 1424 (9th Cir. 1985) (quoting *United States v. Zemek*, 634 F.2d 1159, 1173 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341, 450 U.S. 985, 101 S.Ct. 1525, 67 L.Ed.2d 821 & 452 U.S. 905, 101 S.Ct. 3031, 69 L.Ed.2d 406 (1981)), *cert. denied*, 475 U.S. 1024, 106 S.Ct. 1219, 89 L.Ed.2d 330 (1986). The Hobbs Act defines "extortion" as "the obtaining of *property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). "The concept of property under the Hobbs Act has not been limited to physical or tangible 'things.' The right to make business decisions and to solicit business free from wrongful coercion is a protected property right." *Zemek*, 634 F.2d at 1174 (citing *United States v. Santoni*, 585 F.2d 667, 672-73 (4th Cir. 1978) (property extorted was the right of victim to make a business decision free from outside pressure wrongfully imposed), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 459 (1979)) (other citations omitted); *see also Hoelker*, 765 F.2d at 1425 (property right involved was right to make business decisions free from threats and coercion); *see, e.g.*, *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (abortion center could recover on RICO claim based upon Hobbs Act extortion violation by protestors who used force and threats of force to close the center, regardless of whether the protestors actually succeeded, because the center had a property right to continue to operate its business), *cert. denied*, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

In this case, Plaintiffs allege that Defendants' threats of force contained in the Deadly Dozen List, "unwanted"-style posters, and similar publications "have decreased the volume of business of plaintiffs or increased their cost of doing business, or both." Compl. ¶¶ 97-99. Moreover, "Defendants' activities also have injured the named plaintiffs * * * by depriving them of the right to engage in a business relationship with actual and prospective patients, to reap the economic advantages of those relationships, and to enter into such relationships free of threats of force." *Id.* ¶ 99. Defendants have allegedly caused Plaintiffs to suffer $50 million in economic damage. *Id.* ¶ 100. I find that these allegations sufficiently identify injury to Plaintiffs' property right to engage in their business without threats of violence, and are sufficient to state an extortion claim under the Hobbs Act.

b. Oregon Coercion Statute: ORS 163.275

Plaintiffs' ORICO claims are based upon the predicate act of coercion which is defined under ORS 163.275 (1995) and set forth in relevant part as follows:

(1) A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:

(a) Unlawfully cause physical injury to some person; * * *.

The Oregon Supreme Court struck down a former version of the Oregon Coercion Statute, ORS 163.275 (1971), as unconstitutionally overbroad under Article I, section 8, of the Oregon Constitution[26] because that version impermissibly burdened protected speech. *State v. Robertson*, 293 Or. 402, 436, 649 P.2d 569 (1982).[27] Subsequent to *Robertson*, however, the Oregon Legislature redrafted the statute in order to correct its overbreadth. According to the Oregon Court of Appeals, the current, redrafted version of at least ORS 163.275(1)(a) passes constitutional muster provided that the "fear" which is "instilled" in the other person is objectively reasonable, the physical injury that is feared is objectively reasonable, and the "some person" to whom injury is threatened is some specific person. *State v. Stone*, 84 Or. App. 575, 578, 735 P.2d 7 (1987), *rev. denied*, 303 Or. 700, 740 P.2d 1213 (1987).[28]

Plaintiffs do not specify which subsections of the Oregon Coercion Statute that they assert as ORICO predicate

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[26] Article I, section 8, of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever * * *."

[27] Specifically, the former version was overbroad because it covered "all demands to take or to refrain from nonobligatory action coupled with threats of adverse consequences in case of noncompliance, whether these demands and threats are stated privately or publicly and irrespective of the relationship of the parties themselves or with the public." *Id.* at 436.

[28] The court in *Stone* noted that there is some disagreement as to whether the *Robertson* court declared the whole statute invalid or just subsection 163.275(1)(e), the section under which the defendant in *Robertson* was charged. *Stone*, 84 Or. App. at 575 n.1, 735 P.2d 7. The court did not resolve the disagreement, but rather severed 163.275(1)(a) from the rest of the statute for constitutional scrutiny. Consequently, *Stone*'s holding only expressly applies to ORS 163.275(1)(a). No court has interpreted any other subsection of the statute.

acts. Defendants challenge the constitutionality of all subsections other than § 163.275(1)(a) which was upheld in *Stone*. However, I will not engage in a blanket constitutional inquiry of the Oregon Coercion Statute if Plaintiffs only rely on subsection (1)(a). Therefore, without clear direction, this Court will assume that Plaintiffs only rely on subsection (1)(a). If this assumption is incorrect, Plaintiffs may amend their Complaint to include additional subsections, and Defendants may attack the constitutionality of the other subsections of the Oregon Coercion Statute on which Plaintiffs rely.

Although Plaintiffs do not allege specific facts showing that Defendants actually committed coercion, *see State v. Johnson*, 110 Or. App. 362, 363, 822 P.2d 153 (1991) ("[c]oercion requires proof that the victim was *actually* compelled or induced to abstain from engaging in the conduct in which she had a right to engage or not to engage" (emphasis added)), Plaintiffs may nonetheless pursue claims under ORICO because "racketeering activity" under ORICO includes *attempts* to commit coercion. *See* ORS 166.715(6)(a)(I). Therefore, to prove an ORICO claim, Plaintiffs need only show that Defendants *attempted* to commit coercion, not that Defendants actually violated the Oregon Coercion Statute by coercing Plaintiffs. I find that Plaintiffs have alleged sufficient facts showing that Defendants attempted to coerce Plaintiffs from providing abortions by publishing and disseminating threats of physical harm directed at Plaintiffs.[29]

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[29] For the same reasons, Plaintiffs have also stated a claim under the Oregon Menacing Statute which provides: "(1) A person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." ORS 163.190. A violation of the Oregon Menacing Statute may be a predicate act under ORICO. See ORS 166.715(6)(a)(G).

C. Standing to Assert RICO Claims

1. Argument

Third, Defendants contend that even if Plaintiffs properly pleaded extortion and coercion as RICO predicate acts, Plaintiffs do not have standing under RICO because they fail to allege concrete financial loss as a result of the RICO violations. Plaintiffs did not respond to this argument.

2. Analysis

RICO authorizes a private civil action by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Private litigants have standing under RICO only to the extent that they have been injured in their business or property by the conduct constituting the RICO violation. *Sedima, S.P.R.L. v. Imrex Company*, 473 U.S. 479, 495-96, 105 S.Ct. 3275, 3284-85, 87 L.Ed.2d 346 (1985). "[I]njuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff." *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (diminution in enjoyment of leasehold interest does not constitute a tangible loss to tenant who did not allege any out-of-pocket expenditures as a direct or indirect result of the racketeering activity), *cert. denied*, 506 U.S. 1020, 113 S.Ct. 655, 656, 121 L.Ed.2d 581 (1992); *Steele v. Hospital Corporation of America*, 36 F.3d 69 (9th Cir. 1994) (depletion of insurance funds by excess medical payments does not constitute a financial loss to patients). Likewise, speculative injuries do not confer standing under RICO, unless they become concrete and actual. *Steele*, 36 F.3d at 71 (claim that father of patient "could have used some of those [insurance] benefits for myself" was insufficient where father did not specify an instance where he had to pay a claim out of his own funds because the funds had been exhausted); *Oscar*, 965 F.2d at 787 (claim that plaintiff suffered losses in the reduced rent

she could charge to sublet her apartment was insufficient where plaintiff did not allege that she had a right to sublet her apartment nor that she ever sublet the apartment or attempted to sublet the apartment); *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992) (claim that plaintiff suffered loss of profits was insufficient where it was impossible to determine whether plaintiffs were alleging lost opportunity to realize profits or loss of specific identifiable profits), *cert. denied*, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993).

In the present action, Plaintiffs allege that Defendants' racketeering activities are directed at Plaintiffs "to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶ 97. Plaintiffs further allege that "defendants' racketeering activities have decreased the volume of business of plaintiffs or increased their cost of doing business" and "are calculated to induce clinic personnel to give up their jobs and doctors to forego their economic right to practice medicine" which have injured Plaintiffs in an amount not less than $50 million for each RICO and ORICO claim. *Id.* ¶¶ 99-100.

Although Plaintiffs do not specifically identify how they calculated their damages of at least $50 million, I conclude that Plaintiffs have alleged sufficient facts regarding their concrete financial loss to confer standing, according to *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). In *Scheidler*, two corporate health care centers alleged RICO claims under § 1964(c), claiming that defendants "conspired to use threatened or actual force, violence or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *Id.* at 253, 114 S.Ct. at 801-02. Plaintiffs further alleged that the conspiracy "injured the business and/or property interests of the

petitioner." *Id.* at 253-54, 114 S.Ct. at 802 (internal quotation marks omitted). The Supreme Court held that these allegations stated a claim under RICO for injury to "business or property."[30] *Id.* at 256, 114 S.Ct. at 803. I find that *Scheidler* compels the same result in this case; thus, Plaintiffs have alleged sufficient financial loss to confer standing to assert their RICO claims.[31]

D. RICO Enterprise and Participatory Conduct

1. Arguments

Fourth, Defendants argue that Plaintiffs' allegations do not show that Defendants' alleged RICO enterprise (*i.e.*, ACLA) is distinct from the pattern of racketeering activities of each Defendant, but rather demonstrate that ACLA exists solely to further Individual Defendants' racketeering activities. Moreover, Plaintiffs failed to adequately allege that Individual Defendants participated in the operation and management of the "enterprise."

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[30] In so holding, the Court quoted *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) for the relevant proposition that "'[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Scheidler*, 510 U.S. at 256, 114 S.Ct. at 803.

It is also noteworthy that the plaintiffs in *Scheidler*, like the Plaintiffs in the present action, alleged extortion in violation of the Hobbs Act as one of the RICO predicate acts. *Id.* at 253, 114 S.Ct. at 801.

[31] However, as *Scheidler* states, "[s]tanding represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Id.* at 255, 114 S.Ct. at 802. Therefore, if at any time facts show that any of the Plaintiffs lack sufficient injury to confer standing to assert RICO claims, those claims will be dismissed as to that Plaintiff(s).

Contrary to Defendants' assertions, Plaintiffs argue that they have satisfied the "enterprise" element of RICO by alleging that ACLA exists as a separate entity from the Individual Defendants and is involved in their racketeering activities. In addition, each Individual Defendant violated RICO by participating in the operation and management of the RICO "enterprise," ACLA.

2. Analysis

RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity * * * [or] any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and is "separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981)). "Wholly unlawful enterprises fall within RICO's provisions." *Webster v. Omnitrition Intern.*, Inc., 79 F.3d 776, 787 (9th Cir. 1996), petition for cert. filed, 65 U.S.L.W. (U.S. July 16, 1996) (No. 96-82). In addition, for liability to attach to individual defendants, plaintiff must show that the individuals participated in the operation or management of the enterprise which requires that the defendant have "some part in directing the enterprise's affairs" for RICO liability to attach. *Reves v. Ernst & Young*, 507 U.S. 170, 179, 185, 113 S.Ct. 1163, 1170, 1173, 122 L.Ed.2d 525 (1993).

The Ninth Circuit in *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), recently discussed the minimal requirements to show an enterprise under RICO. A RICO enterprise must exhibit some sort of decision-making structure, and some on-going means of controlling and directing the affairs of the associated group. *Id.* at 1299 (quoting *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983)).

However, it "is not necessary to show that the organization 'has some function wholly unrelated to the racketeering activity.'" *Id.* (quoting *Riccobene*, 709 F.2d at 223-24); *see also United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) ("it would be nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity"). "Rather, it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering." *Id.* (citing *Riccobene*, 709 F.2d at 224). Therefore, the enterprise's only purpose may be to pursue the racketeering activity of its members, but the "enterprise" must not be one and the same as the "pattern of racketeering."[32] *See Chang*, 80 F.3d at 1300 (dismissing RICO claim, in part, because plaintiffs failed to allege "a structure to the organization beyond that which was inherent in the alleged acts of racketeering activity").

In the present action, the "enterprise" element of RICO is easily satisfied because ACLA exists as a distinct legal entity. ACLA is a national organization composed of individuals who allegedly endorse violence and intimidation as a means of furthering their anti-abortion message. Compl. ¶ 17. All the Individual Defendants have been or are affiliated with ACLA, but ACLA's membership extends beyond the Individual Defendants. Compl. ¶¶ 17, 19-32. ACLA holds various conferences which involve ACLA members from around the nation. Compl. ¶¶ 40, 47. ACLA published and disseminated the Deadly Dozen List which contains ACLA's name and address on the bottom of the list. Compl., Ex. A. Moreover, ACLA published numerous other "wanted"-style posters. Based upon these allegations and the logical inferences, Defendants' suggestion that ACLA does

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[32] Contrary to Defendants' assertions, the enterprise need not have an economic motive. *Scheidler*, 510 U.S. 249, 259-62, 114 S.Ct. 798, 805-06.

not exist as an anti-abortion organization separate and distinct from the pattern of racketeering activity is absurd. Accordingly, I find that Plaintiffs have satisfied the "enterprise" element of their RICO claims.

In addition, Plaintiffs' allegations support the conclusion that almost all of the Individual Defendants had some part in the operation and management of ACLA, the RICO enterprise. *See Reves*, 507 U.S. 170, 179, 113 S.Ct. 1163, 1170 ("the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required"). Plaintiffs state that Defendants Burnett, Crane, Dreste, Dodds, Mears, Miller, Murch, Stover, Treshman, and Wysong are, or were, Directors of ACLA during the relevant time period and agreed to publish and disseminate the Deadly Dozen List and other "unwanted"-style posters. (Compl. ¶¶ 20-23, 26-28, 30-32, 96). Furthermore, Defendants ALM, Foreman, McMillian, and Ramey all are members of ACLA and allegedly marketed and distributed ACLA publications and other statements threatening the use of force against plaintiffs. Compl. ¶¶ 18, 24- 25, 29. I find that Plaintiffs sufficiently allege that these Defendants participated in the operation and management of the RICO enterprise.

However, Defendant Bray is not a member of ACLA and has merely "attended ACLA meetings and * * * promoted ACLA's threatening message." Bray's statements promoting ACLA's anti-abortion message do not constitute participation in the "operation and management" of the enterprise. *See, e.g., Webster*, 79 F.3d 776, 789 (defendant's ministerial role in the enterprise and statements promoting the scheme did not constitute participation in the "operation or management" of the enterprise). Therefore, Plaintiffs' RICO and ORICO claims against only Defendant Bray are

dismissed. Plaintiffs have alleged sufficient participation by every other Defendant.

E. RICO Conspiracy

1. Arguments

Lastly, Defendants urge the Court to dismiss Plaintiffs' RICO conspiracy claims because no factual allegations suggest that Individual Defendants conspired and agreed to violate RICO. However, Plaintiffs argue that Defendants are involved in a conspiracy because each Individual Defendant, through their participation in the "enterprise," (*i.e.*, ACLA) allegedly agreed to violate a substantive RICO provision.

2. Analysis

Section 1962(d) of RICO prohibits "any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." 18 U.S.C. § 1962(d). " 'The essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an *agreement* to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.'" *United States v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993) (quoting *United States v. Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206, 103 S.Ct. 1194, 1195, 75 L.Ed.2d 439 (1983)). A RICO conspiracy does not require that each co-conspirator knows all of the details of the plan or conspiracy. *Baumer v. Pachl*, 8 F.3d 1341, 1347 (9th Cir. 1993) (dismissed RICO conspiracy claim because no allegations suggested assent to contribute to a common enterprise) (quoting *Brooklier*, 685 F.2d at 1222). Moreover, a co-conspirator need not participate personally in two predicate act offenses. *Blinder*, 10 F.3d at 1477.

Plaintiffs have alleged that "[e]ach defendant agreed with some or all of the other defendants to conduct or

participate in the operation, conduct or management of the affairs of ACLA through a pattern of racketeering activity [and] [e]ach defendant further agreed to the commission of two or more predicate acts through which each defendant--as agent of the other defendants and co-conspirators--would conduct or participate in the operation, conduct or management of ACLA's affairs in violation of 18 U.S.C. § 1962(d)." Compl. ¶ 102. These allegations adequately support Plaintiffs' conspiracy claim. At this stage of the litigation I may not resolve the issue of whether all Defendants, in fact, agreed to participate in the management of the enterprise to commit racketeering activity. *See, e.g., Webster*, 79 F.3d 776, 789 (determining on summary judgment that plaintiff produced no evidence showing that defendants conspired to violate RICO). Plaintiffs have met their initial pleading burden by providing fair notice to Defendants of their RICO conspiracy against Defendants.

In sum, Plaintiffs have alleged sufficient facts to support their RICO and ORICO claims, as well as their RICO and ORICO conspiracy claims. However, Plaintiffs' allegations regarding Defendant Bray's involvement in ACLA, the RICO enterprise, show that he did not "participate" in the operation and management of ACLA; thus, all RICO and ORICO claims against Defendant Bray are DISMISSED.

V. Intentional Infliction Of Emotional Distress

A. Defendants' Arguments

Defendants contend, as a matter of law, that Plaintiffs cannot recover for intentional infliction of emotional distress caused by either the dissemination of true information or Defendants' lawful exercise of constitutionally protected speech. Furthermore, Plaintiffs fail to allege specific facts showing that Defendants directed conduct towards Plaintiffs

which extended beyond the farthest reaches of socially tolerable behavior.

B. Plaintiffs' Arguments

Plaintiffs argue that they may recover on a claim for intentional infliction of emotional distress regardless of whether Defendants are disseminating true information or exercising their constitutional right to free speech. Moreover, whether Defendants' conduct exceeded the bounds of socially tolerable conduct is an issue of fact for the jury.

C. Analysis

To state a claim for intentional infliction of emotional distress, Plaintiffs must allege the following:

(1) defendant intended to inflict severe emotional distress on the plaintiff,

(2) the defendant's acts were the cause of the plaintiffs severe emotional distress, and

(3) the defendant's acts constitute an extraordinary transgression of the bounds of socially tolerable conduct.

Madani v. Kendall Ford, Inc., 312 Or. 198, 203, 818 P.2d 930 (1991) (citation omitted) (court dismissed plaintiff's claim for intentional infliction of emotional distress where employer fired plaintiff for refusing to pull down his pants at employer's request). The "intent" element of the tort is satisfied where "'the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct.'" *McGanty v. Staudenraus*, 321 Or. 532, 550, 901 P.2d 841 (1995) (reversed the trial court's dismissal of plaintiff's claim for intentional infliction of emotional distress based on defendant's course of conduct constituting sexual harassment,

such as unwelcome sexual advances, comments, and physical conduct directed towards plaintiff) (quoting comment i of the Restatement (Second) of Torts § 46 (1965)).

In considering whether the defendant's acts were an extraordinary transgression of the bounds of socially tolerable behavior, the key focus is "on the purpose and the means used to achieve it." *Patton v. J.C. Penney Co.*, 301 Or. 117, 123, 719 P.2d 854 (1986) (court dismissed employee's complaint alleging that employer intentionally inflicted emotional distress by discharging the employee because he was socializing with a co-worker). The conduct must be deliberate and the means of inflicting the harm must be extraordinary:

> [t]he additional requirement that defendant's means of inflicting the injury must have been extraordinary is explained as necessary, first, to distinguish actionable conduct from insults, ill temper, and offensive jokes that persons are expected to endure under contemporary standards of behavior, and second, to provide a setting of objective reality for a claim of harm that otherwise rests only on evidence of the plaintiff's subjective reaction divorced from physiological or other tangible injury.

Id. at 123, 719 P.2d 854 (quoting *Brewer v. Erwin*, 287 Or. 435, 457, 600 P.2d 398 (1979) (submitted issue of outrageousness to the jury where defendant attempted to frighten or bully plaintiff out of her apartment by particularly obnoxious means: disconnecting utilities, using physical violence and threats of violence, and demolishing the building under her feet). "The tort does not provide recovery for the kind of temporary annoyance or injured feelings that result from friction and rudeness among people in day-to-day life." *Shay v. Paulson*, 131 Or. App. 270, 884 P.2d 870 (1994) (court dismissed complaint alleging that defendant

intentionally inflicted emotional distress by forging plaintiff's name on magazine order forms).

Moreover, the court will only consider acts which have occurred within two years from the date the complaint was filed.[33] *Richer v. Poisson*, 137 Or. App. 157, 160-61, 903 P.2d 932 (1995) (concluding that plaintiffs stated a claim for intentional infliction of emotional distress by alleging that, defendant, for the purpose of causing plaintiffs' emotional distress, painted graffiti on their windows, harassed them by telephone and harassed their customers by making obscene gestures) (citing ORS 12.110(1)).

In the present action, Plaintiffs allege that Defendants published and disseminated posters, which threatened physical harm to Plaintiffs, with specific intent to inflict severe mental and emotional distress upon plaintiffs. Compl. ¶ 119. Furthermore, the dissemination of these threatening posters exceeds the bounds of socially tolerable conduct and has caused Plaintiffs to suffer severe mental and emotional distress. Compl. ¶¶ 120-21. The Complaint also contains significant background regarding the potential violent effect of Defendants' posters, such as murder, attempted murder, and assault of the individuals targeted in the posters. Compl. ¶¶ 50- 80. Based upon these allegations, I cannot hold as a matter of law that Defendants' alleged threatening conduct does not exceed the bounds of socially tolerable conduct.

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[33] As stated above, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context. Both the Deadly Dozen List and the Crist poster occurred within 2 years from October 26, 1995, the date this action was filed. Other "wanted"-style posters were disseminated more than two years before the filing of the Complaint but may be relevant to provide context to the potentially actionable threats.

Accordingly, Plaintiffs have stated a claim for intentional infliction of emotional distress.[34]

VI. Punitive Damages

As Defendants correctly state, Article I, section 8, of the Oregon Constitution prohibits punitive damages for injuries resulting from an abuse of protected expression. *Huffman*, 317 Or. at 457, 857 P.2d 101 (punitive damages were properly awarded for trespassing which was non-expressive conduct); *Lewis v. Oregon Beauty Supply Co.*, 302 Or. 616, 629, 733 P.2d 430 (1987) (on a claim for intentional infliction of emotional distress, the court allowed punitive damages for the non-communicable conduct but prohibited punitives for the communicable conduct); *Hall v. May Dept. Stores*, 292 Or. 131, 146-47, 637 P.2d 126 (1981) (court held that plaintiff could not receive punitive damages on claim for intentional infliction of emotional distress where the tortious conduct (*i.e.*, falsely accusing plaintiff of stealing and oppressively interrogating her) consisted only of

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[34] In so holding, I reject Defendants' suggestion that they cannot be held liable for the tortious effects of their expression, absent a specific privilege, merely because they are exercising their constitutional right to speech. If Defendants' assertions were true, a victim of defamation could never sue the perpetrator because the offense necessarily involves the exercise of one's right to speech. *See Huffman and Wright Logging Co. v. Wade*, 317 Or. 445, 453, 857 P.2d 101 (1993) ("The content of speech or writing is an element of the tort of defamation;" thus, only compensatory and not punitive damages may be awarded). Moreover, the truthfulness or falsity of the content of Defendants' expressive conduct is irrelevant with regard to the tort of intentional infliction of emotional distress. Rather, the expressive conduct need only be outrageous in the extreme, regardless of whether the content of the communications is true or false. *Id.* at 455, 857 P.2d 101 ("The content of speech is not an element of the tort[ ] * * * of intentional infliction of emotional distress * * *." Rather, the tort of intentional infliction of emotional distress focuses on the "forbidden effects but expressly prohibit[s] expression to achieve those effects").

expression). Conversely, the Oregon Constitution does not bar recovery of punitive damages or criminal liability for unprotected expression. *See, e.g., State v. Moyle*, 299 Or. 691, 699-704, 705 P.2d 740 (1985) (noting the similarity between criminal liability and punitive damages, and holding that criminal harassment statute did not violate Article I, Section 8, because it prohibited threats to cause serious injury to that person); *see also Stone*, 84 Or. App. at 578, 735 P.2d 7 ("a demand coupled with a threat of unlawful injury to specific persons or property enjoys no constitutional protection if it is objectively believable that the threat will be carried out if the demand is not complied with").[35]

Oregon law is not entirely clear as to whether Plaintiffs may receive punitive damages for injuries caused by Defendants' alleged conduct in this case. However, if the facts demonstrate that Defendants' expression does not constitute a threat of serious physical harm toward Plaintiffs, that expression may be protected under Article I, Section 8, of the Oregon Constitution, as well as the First Amendment of the United States Constitution. In that event, punitive damages for intentional infliction of emotional distress caused by Defendants' expression would be barred.[36] However, because Plaintiffs allege that Defendants' expression constitutes threats of serious physical harm towards Plaintiffs,

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[35] Likewise, as extensively discussed above, the First Amendment to the United States Constitution also does not protect "true threats" of serious physical harm. *See* discussion in Part II.C. of this Opinion.

[36] As to the other causes of action, if the facts show that Defendants' expressions are not "true threats," most of Plaintiffs' federal and state claims would likely extinguish and this issue would become moot.

Plaintiffs may allege punitive damages for all claims.[37] I decline to reach a decision on this matter at this juncture.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss Plaintiffs' Complaint (#103, #104, #112) are DENIED. Defendant ACLA's Motion for Judgment on the Pleadings (#114) is DENIED IN PART and GRANTED IN PART as follows: All RICO and ORICO claims against Defendant Bray are DISMISSED.[38]

Plaintiffs are given LEAVE TO AMEND their Complaint to clearly distinguish between the allegedly actionable and the contextual expressions, as well as to specifically name the individual Defendants who intended to further the alleged threats of violence.

IT IS SO ORDERED[39]

September 18, 1996

ROBERT E. JONES
U.S. District Judge

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[37] Plaintiffs may seek punitive damages on all other claims, so long as the damages are awarded for violation of the statute, and not for the content of the speech.

[38] The inclusion of factual matters outside the pleadings ordinarily requires Rule 12 motions to be treated as a Rule 56 motion for summary judgment, *see* Fed. R. Civ. P. 12(b); *see also* William W. Schwarzer, A. Wallace Tashima, James M. Wagstaffe, Federal Civil Procedure Before Trial, § 9:198 (1996), but at least some discovery must be completed before a motion for summary judgment should even be considered in this case. *See* Fed. R. Civ. P. 56(f).

[39] I emphasize that this decision is made in a FRCP 12(b)(6) setting where all allegations in the Complaint must be accepted as true. The Court will be reevaluating Plaintiffs' claims with great scrutiny after further discovery has been undertaken and the case is ripe for summary judgment.

APPENDIX B

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.

Feb. 25, 1999

ORDER AND PERMANENT INJUNCTION

JONES, District J.

Plaintiffs, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center, doing business as All Women's Health Services (collectively "plaintiffs"), commenced this action seeking a permanent injunction, damages and other relief. The trial before the jury having been concluded, and the jury having found that defendants did issue true threats against plaintiffs, and this Court having found that plaintiffs are without an adequate remedy at law, the Court makes the following findings:

1. The "Deadly Dozen" Poster (Trial Exhibit 1) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

2. The Poster of Dr. Robert Crist (Trial Exhibit 5) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

3. The "Nuremberg Files" (Trial Exhibits 7, 9) are a true threat to bodily harm, assault or kill one or more of the plaintiffs.

4. As a result of the defendants' issuance of these threats, plaintiffs have undertaken a variety of security measures in order to ensure their safety.

5. Based upon the evidence admitted at trial, the Court finds that plaintiffs remain threatened by the defendants' threats, and thus have no adequate remedy at law.

I conclude from my independent review of the evidence produced at trial that plaintiffs have proven by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the "Deadly Dozen" Poster, the Poster of Dr. Robert Crist and the "Nuremberg Files" with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures.[1]

I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from engaging in providing abortion services.

The law requires a higher level of scrutiny and proof for an injunction involving speech than for an award of damages for violation of a statute. *See Madsen v. Women's Health Center*, 512 U.S. 753 (1994). I find the actions of the defendants in preparing, publishing and disseminating these true threats

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[1] The term "threaten" used herein incorporates this definition.

objectively and subjectively[2] were not protected speech under the First Amendment. Therefore, the Court issues the following permanent injunction against each defendant, their agents and those in active concert or participation with them, and specifically against Paul DeParrie, an employee and agent of defendant Advocates for Life Ministries, who conspired with Neal Horsley of Carrollton, Georgia, to provide the specific information for the Nuremberg Files and who thereafter obstructed justice by destroying or assisting in concealing the materials he provided to Horsley to convert into true threats on his web site.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

PERMANENT INJUNCTION

1. Under the equitable powers of this Court and the Court's authority granted under the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of

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[2] For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in context, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

this Order and Permanent Injunction or the "Notice" attached as Exhibit A to this Order, are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site[3] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

2. Defendants and their agents and all individuals in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the attached "Notice" shall promptly submit to the custody of the Court all materials in their possession, custody or control that are not in compliance with the provisions of this Permanent Injunction, except that counsel for the defendants may retain one copy of any such materials that were included in the Record of this Court.

3. Willful violation of this Order and Permanent Injunction or any other of this Court's orders may subject any person who commits such an act to criminal and/or civil prosecution for contempt of this Court. Any violation of this Order and Permanent Injunction will result in immediate issuance of an order to show cause for service on the violator, who after appropriate hearings and findings, will be dealt with within the sanctions provided by law.

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[3] A "mirror web site" within the meaning of this Order means a webs site created by an independent party who takes the content from the web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

4. Defendants, and their agents and all persons in active concert or participation with any of them, are hereby ENJOINED and RESTRAINED from disposing of, secreting, pledging, encumbering, conveying, transferring, damaging, mortgaging, or otherwise disposing or removing from its customary location or in any other way making unavailable to the processes of the court, any of their real property or personal property, including, but not limited to, cash, bank accounts, retirement plans, bonds, and other securities, liquid assets and personal property regardless of whether the property is held jointly with another person or individually by the defendant.

5. This Court shall retain jurisdiction of this action for all purposes, including without limitation, all proceedings involving the interpretation, enforcement or amendment of this Order and Permanent Injunction.

February 25, 1999

ROBERT E. JONES
U.S. District Judge

EXHIBIT A
NOTICE OF ORDER OF PERMANENT INJUNCTION

The United States District Court for the District of Oregon in the above-captioned case has ordered that Defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of the Order and Permanent Injunction or this Notice are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services,

or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site[1] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

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[1] A "mirror web site" within the meaning of this Order means a web site created by an independent party who takes the content from a web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

YOU ARE HEREBY DIRECTED TO CONFORM YOUR CONDUCT TO THE REQUIREMENTS OF THIS ORDER. IF YOU DO NOT, YOU MAY BE ORDERED TO SHOW CAUSE WHY YOU SHOULD NOT BE IMMEDIATELY ARRESTED. YOU MAY ALSO HAVE TO PAY A CIVIL CONTEMPT FINE OF UP TO $1,000.00 PER DAY UNTIL YOU COMPLY WITH THIS ORDER OR BE SUBJECT TO OTHER SANCTIONS AS PROVIDED BY LAW.

APPENDIX C

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC.; ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,
Defendants.

SELECTED FINAL JURY INSTRUCTIONS

January 26, 1999

Now, as to the First Amendment, instruction number eight. The First Amendment permits persons to join with others to express a particular viewpoint. Speech is protected, if the speech — even if the speech is insulting, outrageous, or even offensive. There is no — this is so even if the speech is uninvited and unwelcome by the person to whom it is directed or to others within earshot.

Even speech that is coercive may be protected if the speaker refrains from violence or from making a true threat. Moreover, the mere abstract teaching of the moral propriety or even moral necessity for resort to force and violence is protected speech under the First Amendment. However, true threats are not protected by the First Amendment.

Now, instruction number nine. As I have explained to you, in the course of this trial, there is no claim, in this case, that

any of the three statements, that have been listed to you — listed for you, is an incitement to violence by persons other than the defendants.

What is incitement? Incitement is speech which must be intended to produce and is likely to produce imminent violence or a violation of law through the actions of persons other than the speaker. Imminent means following closely in time.

There is no claim, in this case, that the three statements, I have listed for you, have produced imminent violence against plaintiffs. Plaintiffs claim only that these three statements are threats of force, true threats, not that the statements have caused anyone or will cause anyone, in the future, to use force against plaintiffs.

You are not to consider any evidence that the three statements allegedly incite violence against plaintiff. You are to consider only that the statements are true threats — only whether the statements are true threats, as I will now define that term for you.

APPENDIX D

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC., ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Defendants.

VERDICT

1. Is the "Deadly Dozen" poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

✓	
YES	NO

2. Is the Crist poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

✓	
YES	NO

3. Are the Nuremberg files a true threat by one or more of the defendants to bodily harm, assault or kill any of the plaintiffs?

✓	
YES	NO

If you answered "yes" to any of the above, please proceed to the next section. Otherwise, please put the presiding juror's number on the signature line, date this form, and notify the courtroom deputy that you have reached a verdict.

AMERICAN COALITION OF LIFE ACTIVISTS ("ACLA")

1. Did the American Coalition of Life Activists ("ACLA") violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for ACLA's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$2.25 million
Dr. Warren Hern	$ 14,429.00	$1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$2 million
Dr. James Newhall	$ 375.00	$2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$6 million
Portland Feminist Women's Health Center	$ 50,243.30	$3 million

ADVOCATES FOR LIFE MINISTRIES ("ALM")

1. Did Advocates for Life Ministries ("ALM") violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for ALM's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$2.25 million
Dr. Warren Hern	$ 14,429.00	$1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$2 million
Dr. James Newhall	$ 375.00	$2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$6 million
Portland Feminist Women's Health Center	$ 50,243.30	$3 million

3. Did ALM violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for ALM's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

MICHAEL BRAY

1. Did Michael Bray violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Michael Bray's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Michael Bray violate or conspire to violate RICO?

☐ Yes ☒ No

4. If you answered "yes" to Question #3, what damages do you award for Michael Bray's violation(s) of RICO?

Dr. Robert Crist $_____

Dr. Warren Hern $_____

Dr. Elizabeth Newhall $_____

Dr. James Newhall $_____

Planned Parenthood of the Columbia/Willamette, Inc. $_____

Portland Feminist Women's Health Center $_____

ANDREW BURNETT

1. Did Andrew Burnett violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Andrew Burnett's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Andrew Burnett violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Andrew Burnett's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

DAVID CRANE

1. Did David Crane violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for David Crane's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did David Crane violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for David Crane's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

MICHAEL DODDS

1. Did Michael Dodds violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Michael Dodds' violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Michael Dodds violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Michael Dodds' violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 304,376.00
Portland Feminist Women's Health Center	$ 37,682.00

TIMOTHY DRESTE

1. Did Timothy Dreste violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Timothy Dreste's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Timothy Dreste violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Timothy Dreste's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

JOSEPH FOREMAN

1. Did Joseph Foreman violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Joseph Foreman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Joseph Foreman violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Joseph Foreman's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

C. ROY MCMILLAN

1. Did C. Roy McMillan violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for C. Roy McMillan's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did C. Roy McMillan violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for C. Roy McMillan's violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 304,376.00
Portland Feminist Women's Health Center	$ 37,682.00

BRUCE MURCH

1. Did Bruce Murch violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Bruce Murch's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Bruce Murch violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Bruce Murch's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

CATHERINE RAMEY

1. Did Catherine Ramey violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Catherine Ramey's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$500,000.00
Dr. Warren Hern	$ 14,429.00	$500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$500,000.00
Dr. James Newhall	$ 375.00	$500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$750,000.00

3. Did Catherine Ramey violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Catherine Ramey's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

DAWN STOVER

1. Did Dawn Stover violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Dawn Stover's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$500,000.00
Dr. Warren Hern	$ 14,429.00	$500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$500,000.00
Dr. James Newhall	$ 375.00	$500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$750,000.00

3. Did Dawn Stover violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Dawn Stover's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

DONALD TRESHMAN

1. Did Donald Treshman violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Donald Treshman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Donald Treshman violate or conspire to violate RICO?

☐ Yes ☒ No

4. If you answered "yes" to Question #3, what damages do you award for Donald Treshman's violation(s) of RICO?

Dr. Robert Crist	$ _____
Dr. Warren Hern	$ _____
Dr. Elizabeth Newhall	$ _____
Dr. James Newhall	$ _____
Planned Parenthood of the Columbia/Willamette, Inc.	$ _____
Portland Feminist Women's Health Center	$ _____

CHARLES WYSONG

1. Did Charles Wysong violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Charles Wysong's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Charles Wysong violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Charles Wysong's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

The foregoing is the unanimous verdict of this Jury in the matter of *Planned Parenthood, et al. v. American Coalition, et al.*, Civil No. 95-1671-JO.

DATED this 2nd day of February, 1999.

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PRESIDING JUROR NO.